Supreme Court, U.S.
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In The
Supreme Court of the United States

VERONICA ALVAREZ,

Petitioner,

v.

DES MOINES BOLT SUPPLY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK D. SHERINIAN
Counsel of Record
SHERINIAN, LEGRANT & HASSO LAW FIRM
3737 Woodland Avenue, Suite 630
West Des Moines, Iowa 50266
(515) 224-2079
sherinianlaw@msn.com

MICHAEL J. CARROLL
BABICH GOLDMAN
100 Court Avenue, Suite 403
Des Moines, Iowa 50309
(515) 244-4300

Counsel for Petitioner

March 23, 2011

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QUESTION PRESENTED

Title VII to the United States Civil Rights Act of 1964, in relevant part, prohibits discrimination in the workplace on the basis of sex. This Court in *Faragher v. City of Boca Raton* and *Burlington Indus., Inc. v. Ellerth* interpreted Title VII to require employers to take reasonable care to prevent and correct promptly any sexually harassing behavior by supervisors. It expressly reserved for another day the question of employer liability for co-worker harassment.

The question presented is:

> May an employer be held liable under Title VII of the 1964 Civil Rights Act for failing to exercise reasonable care to prevent co-worker sexual harassment from creating an unlawful hostile work environment?

PARTIES TO THE PROCEEDING

Petitioner is Veronica Alvarez. The Respondent is Des Moines Bolt Supply Company, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Veronica Alvarez respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on November 17, 2010.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. 1a-27a) is reported at 626 F.3d 410 (8th Cir. 2010). The Order of the United States District Court for the Southern District of Iowa granting respondents' motion for summary judgment is not reported. (App. 28a-64a)

JURISDICTION

The Court of Appeals entered its judgment on November 26, 2010. A petition for rehearing *en banc* was denied on December 23, 2010. (App. 65a) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-2 states, in relevant part:

> Unlawful employment practices
>
> (a) Employer practices. It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> . . .

INTRODUCTION

This Court in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 141 L.Ed.2d 633, 118 S.Ct. 2257 (1998), and *Faragher v. Boca Raton,* 524 U.S. 775, 141 L.Ed.2d 662, 118 S.Ct. 2275 (1998) ruled definitively on employers' duty to respond to harassment against

employees by supervisors. However, it declined to decide the issue of an employer's liability for co-worker harassment in either *Ellerth* or *Faragher,* or later in *Pa. State Police v. Suders,* 542 U.S. 129, 124 S.Ct. 2342, 159 L.Ed.2d 204 (2004). The Circuit courts have developed different standards for such co-worker liability. The Eighth and Sixth Circuits have diverted from the general agreement among the remaining circuits regarding when and how an employer must investigate and respond to employee complaints of co-worker harassment in order to escape liability under Title VII. The Eighth and Sixth Circuits place a far greater burden on harassment victims by absolving employers of any duty to investigate, correct, or prevent known sexual harassment until the harassment worsens to the point that it becomes actionable under Title VII. The Seventh, Ninth and Tenth Circuits articulate a standard which requires employers to investigate conduct which may be actionable and holds them liable for failing to prevent a hostile work environment from occurring, when they have actual or constructive knowledge of the harassment leading to that hostile environment.

In the instant case, the court below ruled *sua sponte* that where complaints of co-worker sexual harassment were made before a hostile environment level had been reached, the employer was insulated from liability for failing to act on those complaints, where a hostile environment later developed. This ruling contradicts the preventive purposes of Title VII and stands in conflict with other circuits on the

employer's duty to investigate and prevent further harassment upon notice of such harassment. This case provides the opportunity for the Court to firmly establish the parameters of employer liability for co-worker sexual harassment under Title VII and the point at which an employer's duty to prevent sexual harassment begins. In so doing, the Court will resolve the circuit split on this issue.

STATEMENT OF THE CASE

The complaints in this case involve ongoing co-worker sexual harassment suffered by the Petitioner, Veronica Alvarez (Alvarez) during her employment at Des Moines Bolt Supply, Inc. (DMB), her multiple complaints to supervisors about the harassment, and DMB's response to those complaints.

Alvarez was employed by DMB on February 19, 2001, as an employee in the Des Moines branch's "kit" department. Her job was to work at a table sorting various nuts and bolts. In the fall of 2005 until mid-January 2006, Alvarez reported to supervisor Jay Owens. After mid-January 2006, she reported to Clint Jubell. There were approximately twelve kit department employees, and three of them (including Alvarez) were women. The operations manager was Michael Thompson, and the company's owner and President was Wayne Simmer.

Between September 2005 and January 2006, Brad Nurnberg, Alvarez's co-worker in the kit department,

made numerous sexual comments to her. Nurnberg told Alvarez, "It's too bad you have a five pound [lifting] restriction, 'cause I need your help to hold up my twelve pound penis in the bathroom." On another occasion he told her that he was fixing a table next to her for her to strip dance on. He asked to shake her "girls" [breasts] and jump up and down and to make her "boobs" move. On another occasion he asked her to flip up her top so he could see her "girls." Throughout this period he told her repeatedly how badly he wanted to "get in her pants." His harassment also became physical in nature. On one occasion, he stood behind her so that when she turned around, her shoulder brushed his penis, whereupon he exclaimed, "Oh, Veronica, I'm going to tell that you touched my balls!" On another occasion he stood behind her when she was bent over so that his genital area was touching Alvarez's buttocks. Alvarez yelled at him to leave her alone, and he just smiled and walked away. Nurnberg also began slapping Alvarez on the buttocks, and did so seven times in four weeks.

Alvarez complained to her supervisor, Jay Owens, three times in the fall of 2005. She told him Nurnberg was making sexual comments to her and that Nurnberg was hitting her on the buttocks.[1] After Alvarez's first complaint about verbal conduct, Owens told Nurnberg to stop, but the harassment continued.

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[1] There is a dispute in the record as to when Alvarez first told Owens about the buttocks slapping incident.

Alvarez complained again to Owens that Nurnberg was making sexual comments to her, and Owens again told Nurnberg to stop.[2] The harassment persisted, and escalated in mid-December when Nurnberg began slapping Alvarez on the buttocks. Alvarez complained a third time to Owens on approximately January 10. Alvarez also complained once to human resources representative Sharon Miller that a co-worker was making comments to her about her breasts. Miller did nothing. As the harassment was still continuing, Alvarez complained a fifth time to her new supervisor, Clint Jubell, on January 20, 2006. Jubell asked Alvarez on the spur of the moment to draft a written complaint, which described some, but not all, of the harassing conduct. Jubell and other management staff investigated her claims and suspended both Nurnberg and Alvarez without pay. Alvarez was suspended as well because Nurnberg, after originally denying any harassment, claimed that Alvarez had engaged in a buttocks-slapping game with him. Throughout the litigation, Alvarez denied ever participating in such conduct.

Upon returning to work following their suspensions, DMB transferred Nurnberg to a different work area, and Nurnberg's sexual harassment of Alvarez stopped. However, other male co-workers began to sexually harass Alvarez, and she resigned due to the continued harassment in May, 2006. Evidence before

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[2] Nurnberg testified that Owens only warned him once.

the Court also included testimony that Wayne Simmer, who made the decision to suspend Alvarez, had also engaged in retaliation against other employees who opposed harassment in the workplace.

Alvarez brought suit against DMB under Iowa law and Title VII alleging claims of sexual discrimination, retaliation, and constructive discharge. The district court granted DMB's motion for summary judgment in its entirety. The Eighth Circuit affirmed, with Judge Beam dissenting as to the grant of summary judgment on Alvarez's hostile environment claim. The dissent noted that the majority should have considered the "totality of the circumstances," not just those incidents Alvarez listed in her written complaint, and that she had presented sufficient evidence of a hostile environment to go the jury.

The Eighth Circuit decided *sua sponte* that DMB was not liable for a failure to take prompt and remedial action in response to Alvarez's first four complaints (one to Miller, three to Owens) "[b]ecause the episodes of misconduct of which DMB had notice prior to January 10 did not create a hostile environment." The Eighth Circuit found DMB was not on notice of *actionable* sexual harassment, and therefore under no duty to respond, until Alvarez complained to Owens for the third time on January 10. This approach of permitting employers to effectively "bury their heads in the sand" upon receipt of early notice of harassment and thus enabling the harassment to escalate

into a hostile work environment is counter to the preventive purpose of Title VII as described by this Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 141 L.Ed.2d 633, 118 S.Ct. 2257 (1998), and *Faragher v. Boca Raton*, 524 U.S. 775, 141 L.Ed.2d 662, 118 S.Ct. 2275 (1998).

The court of appeals denied a petition for rehearing *en banc* on December 23, 2010. App., *infra*, 65a.

REASON FOR GRANTING THE PETITION

THE RULING BELOW STANDS IN IRRECONCILABLE CONFLICT WITH OTHER CIRCUITS IN REGARD TO AN EMPLOYER'S DUTY TO PREVENT CO-WORKER HARASSMENT BEFORE IT BECOMES AN ACTIONABLE HOSTILE ENVIRONMENT.

This Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 141 L.Ed.2d 633, 118 S.Ct. 2257 (1998), and *Faragher v. Boca Raton*, 524 U.S. 775, 141 L.Ed.2d 662, 118 S.Ct. 2275 (1998) recognized that employers under Title VII of the 1964 Civil Rights Act had an "affirmative obligation to prevent" sexual harassment in the workplace. *Id.* at 806. It did so in the context of an employer's liability for harassment by a supervisory employee. The Court declined to articulate the employer's duty when a co-worker is the source of the harassment.

The narrow construction by the court below of an employer's duty to, upon notice of possible harassment, make a reasonable inquiry into the details of the harassment and take measures to prevent it from worsening plainly conflicts with the longstanding view of the negligence standard used in other circuits.

The Eighth Circuit standard imposes employer liability for co-worker harassment "if the company 'knows or should have known of the conduct, unless it can show that it took immediate action and appropriate corrective action.'" *Alvarez*, 626 F.3d at 419, quoting *Engel v. Rapid City Sch. Dist.*, 506 F.3d 1118, 1123 (8th Cir. 2007). "Where an employer takes 'prompt remedial action that is reasonably calculated to stop the harassment,' the employer is not liable under Title VII for the underlying sexual harassment." *Id.* This standard does not include a duty to investigate or prevent harassment of which it has actual or constructive knowledge.

In contrast, the Seventh Circuit's standard for co-worker harassment liability is as follows: "Employers are liable for a co-employee's harassment only when they have been negligent either in *discovering or remedying* the harassment." *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1035 (7th Cir. 1998) (emphasis added), citing *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997) and *Baskerville v. Culligan Internat'l Co.*, 50 F.3d 428, 432 (7th Cir. 1995) ("An employer's legal duty in co-employee harassment cases will be discharged if it takes 'reasonable steps to *discover and rectify* acts of

sexual harassment of its employees") (emphasis added). *See also Cerros v. Steel Technologies, Inc.*, 398 F.3d 944, 952 (7th Cir. 2005) ("An employer satisfies its legal duty in co-worker harassment cases if it takes reasonable steps to *discover and rectify* acts of . . . harassment of its employees") (citing *Parkins*, 163 F.3d at 1035) and *Bernier v. Morningstar, Inc.*, 495 F.3d 369, 373 (7th Cir. 2007) (citing to *Cerros*, 398 F.3d at 952 and *Parkins*, 163 F.3d at 1032).

The Ninth Circuit's standard also creates liability for preventing harassment that becomes actionable. In *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989) the court held that "employers are liable for failing to *remedy or prevent* a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." *Id.* at 1515-16. In *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874-75 (9th Cir. 2001) the court further articulated that "when the employer undertakes no remedy, or where the remedy does not end the current harassment and deter future harassment, liability attaches for both the *past* harassment and any future harassment." *Id.*, citing *Fuller v. City of Oakland*, 47 F.3d 1522, 1528-29 (9th Cir. 1995) (emphasis added). *See also McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1120 (9th Cir. 2004) (same). The standard of the Seventh and Ninth Circuits explicitly requires the employer to affirmatively comply with their duty to prevent the conduct from reoccurring or escalating to a hostile work environment.

The Tenth Circuit has adopted and followed the "remedy or prevent" standard articulated by the Ninth Circuit in *E.E.O.C. v. Hacienda Hotel, supra. Adler v. Walmart Stores, Inc.*, 144 F.3d 664, 673 (1998). (Employer negligence is "failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known"), quoting *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 575 (10th Cir. 1990). *See also Hirase-Doi v. U.S. West Communs., Inc.*, 61 F.3d 777, 783 (10th Cir. 1995) and *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238 (10th Cir. 2001). However, a violation of the duty to investigate potential harassment requires a higher standard. Only when the acts of harassment are so egregious, numerous, and concentrated as to add up to a campaign of harassment will the employer be liable for failure to discover the harassment. *Ford v. West*, 222 F.3d 767, 776 (10th Cir. 2000).

The Sixth Circuit standard is different than all of the other circuits: "Once a hostile work environment is established, an employee alleging sexual harassment by a coworker must still establish that the employer is liable because it knew or should have known of the harassment, yet failed to take prompt and appropriate corrective action." *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 518 (6th Cir. 2001). The Sixth Circuit held in *Blankenship v. Parke Care Ctrs., Inc.*, 123 F.3d 868 (6th Cir. 1997) that when co-worker harassment is at issue, an employer is not liable for "mere negligence," but is liable "if its response

manifests *indifference or unreasonableness* in light of the facts the employer knew or should have known." *Id.* at 873. Even after this Court's decision in *Faragher*, the Sixth Circuit held that " . . . *Blankenship* remains good law for the proposition that a company may be held liable for coworker harassment if its 'response manifests indifference or unreasonableness in light of the facts the employer knew or should have known.'" *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 338 (6th Cir. 2008). *See also McCombs v. Meijer, Inc.*, 395 F.3d 346, 353 (6th Cir. 2005) ("This court has found that when the allegation of sexual harassment involves a coworker and the employer has fashioned a response, the employer will only be liable 'if its response manifests indifference or unreasonableness in light of the facts the employer knew or should have known'") (quoting *Blankenship*, 123 F.3d at 873).

In the First Circuit, an employer is liable for co-worker harassment if the employer "knew or should have known of the charged sexual harassment and failed to implement prompt and remedial action." *Forrest v. Brinker Int'l Payroll Co., LP*, 511 F.3d 225, 230 (1st Cir. 2007) (quoting *White v. N.H. Dept. of Corr.*, 221 F.3d 254, 261 (1st Cir. 2000)). The First Circuit commented on the apparent difference with the Sixth Circuit's standard:

> We therefore find it unnecessary to consider the applicability of the standard articulated by the Sixth Circuit in *McCombs v. Meijer* [395 F.3d 346, 353 (6th Cir. 2005)] ("[A]n

> employer who implements a remedy can be liable for sex discrimination in violation of Title VII only if that remedy exhibits such indifference as to indicate an attitude of permissiveness that amounts to discrimination."). We note that this appears to establish a higher bar to employer liability than the current standard in this Circuit . . .

Forrest, 395 F.3d at 353.

The EEOC has set forth in its regulations a standard that is consistent with the duty to prevent harassment and articulates how employers should do so. The EEOC's Policy Guidance encourages employers to:

> . . . take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f).

In this case, the Eighth Circuit's failure to recognize an employer's duty to prevent harassment from becoming a hostile work environment eviscerated Alvarez's right to work free from any harassment because of her sex. It eliminated any real possibility that others would report similar conduct and contravened the basic negligence standard imposed on employers. Under the standard articulated by the

Eighth Circuit, an employee must endure and report harassment repeatedly until the harassment becomes so severe that it is actionable. Meanwhile, the employer can stand idly by, aware of the repeated conduct but doing nothing, and risk no potential liability until the conduct reaches the severe or pervasive threshold. Once the harassment becomes so severe as to become "actionable," any potential liability for the previous conduct will disappear if the employer takes prompt and remedial action. Yet, throughout the period before the harassment became "actionable," the employee must suffer through progressively worsening conduct. Such a result completely eliminates the duty to *prevent* a hostile work environment articulated by this Court under Title VII and by the EEOC in its regulations. *See Wilson v. Burlington Coat Factory Warehouse of Woonsocket, Inc.*, C.A. No. 01-365T, 2003 U.S. Dist. LEXIS 26191 (D.R.I. Dec. 19, 2003) (The objective of eliminating harassment from the workplace cannot be achieved unless an employer's obligation is read to include a duty to take reasonable steps to prevent a hostile environment from developing).

The ruling below also fails to recognize any employer duty to investigate the conduct of which the employee originally complains. Because the employer is not liable for failing to investigate the conduct, it has no incentive to do anything once it first learns of the harassment. An employee can report the conduct and describe in elaborate detail each of the incidents she has experienced, and the employer is free to do

nothing with absolutely no risk if the conduct is technically not "actionable." On the other hand, a formal investigation will convey the seriousness of the conduct at issue and may convince the harasser to stop the behavior that might cost him his job. In addition, if an employer does investigate, employees who have experienced similar conduct or witnessed the behavior may come forward and confirm the employee's allegations. Without any incentive to investigate, the employer can sweep the harassment under the rug and effectively condone the conduct by its inaction. *Dawson v. Entek International,* 630 F.3d 928, 941 (9th Cir. 2011) ("inaction constitutes a ratification of past harassment").

Despite the legal protections of Title VII's anti-retaliation provisions, women, as well as other protected employees, have a number of reasons compelling them not to report harassment. Embarrassment, ostracism, loss of potential promotions, and the ultimate risk of losing their jobs all push harassment victims to avoid reporting conduct which they have every right not to endure. Under the Eighth Circuit's standard, they must not only suffer all of those risks but they must also predict whether they have suffered a legally cognizable injury. That additional hurdle will further inhibit women from pursuing their right to a harassment-free work environment. *See Gallagher v. Delaney,* 139 F.3d 338, 349 (2d Cir. 1998) (only 26% of all women who have been harassed report such harassment) citing Michele

Ingrassia, *Abused and Confused*, *Newsweek*, Oct. 25, 1993, at 58.

Most importantly, the decision of the Eighth Circuit contravenes the basic nature of the negligence standard articulated by this Court. That standard is determined by what the employer knows or should know. The Eighth Circuit's standard, instead of requiring employers to aggressively prevent harassment, creates a "one free bite" rule, the rule designed to protect a dog owner who had no knowledge of a potential danger. *William L. Prosser*, Prosser on Torts, § 76 at 501-02 (4th ed. 1971) This Court has recognized that hostile environment sexual harassment by supervisors and co-employees is a persistent problem in the American workplace and that an employer can reasonably anticipate the possibility of such conduct occurring in its workplace. *Faragher,* 524 U.S. at 798. Despite the general awareness of a risk that harassment may occur, the Eighth Circuit allows an employer to escape liability even when the risk becomes a real and known danger. The negligence standard for co-worker harassment may not require the demanding response created by vicarious liability in the case of supervisor harassment, but it should nonetheless require affirmative, preventative action, especially where the harassing conduct is obvious.

In sum, the ruling below is inconsistent with the employer's duty articulated by this Court to affirmatively prevent harassment from becoming an actionable hostile work environment. It allows employers to ignore conduct which it knows or should know may

lead to a cognizable injury and only correct the conduct after the injury has already occurred. Granting the petition for certiorari in this case will allow this Court to ultimately delineate the employer's duty to prevent and correct co-worker harassment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK D. SHERINIAN
Counsel of Record
SHERINIAN, LEGRANT &
HASSO LAW FIRM
3737 Woodland Avenue,
Suite 630
West Des Moines, Iowa 50266
(515) 224n2079
sherinianlaw@msn.com

MICHAEL J. CARROLL
BABICH GOLDMAN
100 Court Avenue, Suite 403
Des Moines, Iowa 50309
(515) 244-4300

Counsel for Petitioner

March 23, 2011

**Veronica Alvarez, Appellant, v.
Des Moines Bolt Supply, Inc., Appellee.**

No. 09-1465

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**December 17, 2009, Submitted
November 17, 2010, Filed**

COUNSEL: For Veronica Alvarez, Plaintiff-Appellant: Melissa C. Hasso, Mark D. Sherinian, SHERINIAN & WALKER, West Des Moines, IA.

For Des Moines Bolt Supply Inc., Defendant-Appellee: Thomas M. Werner, West Des Moines, IA.

JUDGES: Before BYE, BEAM, and COLLOTON, Circuit Judges.

OPINION BY: COLLOTON

OPINION

COLLOTON, Circuit Judge.

Veronica Alvarez asserts that while she was employed at Des Moines Bolt Supply, Inc. ("DMB"), she was subjected to sexual harassment from co-workers, and that the company retaliated against her when she complained about the harassment. Alvarez filed suit under Title VII and the Iowa Civil Rights Act, alleging retaliation and sex discrimination based

on a hostile environment. The district court[1] granted summary judgment for DMB, and Alvarez appeals. We affirm.

I.

As we are reviewing a grant of summary judgment, we describe the facts in the light most favorable to Alvarez. Alvarez was employed in the kit department of DMB's Des Moines plant, sorting nuts and bolts, from February 19, 2001, until her resignation on May 2, 2006. Beginning in September 2005, Alvarez recorded in a journal incidents of offensive conduct directed at her by non-supervisory co-workers at DMB. Her journal documented several episodes of inappropriate conduct, including occurrences involving co-worker Brad Nurnberg. Nurnberg made sexually explicit comments to Alvarez and touched her inappropriately.

Alvarez complained to DMB employees about inappropriate conduct by her co-workers on several occasions. First, at a time not specified in the record, Alvarez complained to Sharon Miller, a receptionist with human resources responsibilities, that a co-worker commented on her breasts. Miller did not recall whether she took any action in response to Alvarez's complaint.

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[1] The Honorable James E. Gritzner, United States District Judge for the Southern District of Iowa.

Around November 2005, Alvarez complained to her supervisor, Jay Owens, that Nurnberg had made sexual comments to her. In response, Owens warned Nurnberg not to say anything "sexually inappropriate." Owens also claims that he reported this complaint to Dave Norem, the warehouse manager, but Norem did not recall the complaint, and stated that if he did hear the complaint, he probably did not take any action.

Alvarez later complained to Owens again that Nurnberg made inappropriate comments of a sexual nature. Owens testified that he took the same steps in response to the second complaint and talked to Nurnberg again. Nurnberg recalled Owens warning him only once.

On January 10, 2006, Alvarez complained to Owens for the first time about physical activity by Nurnberg. Alvarez told Owens that Nurnberg had "slapped her on the butt." Owens asserted that in response to this complaint, he talked to Nurnberg, and that Nurnberg denied slapping Alvarez. Owens also said that he talked to other employees about the complaint, and that one employee, Brandin Bales, said that he saw Nurnberg slap Alvarez. Owens made "a file up" and let upper management decide what to do with Nurnberg.

Nurnberg continued with similar conduct, and on January 20, 2006, Alvarez complained to her new supervisor, Clint Jubell. Alvarez told Jubell that Nurnberg was slapping her buttocks, that he called

both her and her husband a "dumb ass," and that he brushed up against her and said "[o]h, Veronica, I'm going to tell that you touched my balls." Jubell asked Alvarez to put her complaint in writing.

Alvarez's written complaint contained similar allegations against Nurnberg. Alvarez stated that Nurnberg "smacks" her butt a lot, whispered sexual slurs in her ear, and called her and her husband a "dumb ass." One alleged slur was a statement by Nurnberg that "[t]o [sic] bad you have [a] 5lb [r]estriction cause I [n]eed your help to hold my 12lb penis in the [b]athroom." She also alleged that Nurnberg made sexual advances toward her, commented on her breasts, handed out a joke flyer that someone found offensive, and stood over her so that when she turned around her shoulder would rub against his penis.

DMB began to investigate Alvarez's allegations. Jubell says that within one business day of Alvarez's complaint, he met with Nurnberg and explained what Alvarez had alleged in her complaint. Nurnberg admitted making "off-colored jokes," but denied the allegations against him. In the course of his investigation, Jubell contacted Michael Thompson, the operations manager for DMB, and Thompson decided to take over the investigation. Thompson interviewed employees who worked with Alvarez in the kit department and other employees who were in the area.

DMB collected written statements from several DMB employees. Brandin Bales reported that he saw Nurnberg slap Alvarez "in the rear." Another kit

department employee, Jamer Lickteig, wrote that he had overheard "dirty" jokes between the two, but at the same time said that he had not heard or seen anything "inappropriate." Damon Robinson, a DMB employee, wrote that he had seen Alvarez and Nurnberg engage in inappropriate actions toward each other, including dirty joke-telling and "smacking" of buttocks over a period of twelve to eighteen months. Kenny Sledge, who performed information technology work in the office at DMB, observed, "I have known [Nurnberg and Alvarez] to make off-color jokes towards each other and have never noticed any kind of discomfort between the two of them."

Nurnberg also contributed a statement, dated January 30, 2006, alleging that he and Alvarez had made "random sexual coments [sic] and gestures" to each other for two years prior to the complaint. He stated that the buttocks slapping was started by Alvarez and another employee as a game, and that it was introduced to him by Alvarez. Nurnberg also asserted that Alvarez often told him about her sex life, and that he was surprised about the harassment complaint, because Alvarez recently had been asking him if she could ride along with him to lunch.

After collecting witness statements, Thompson prepared a report of the investigation. Thompson's report summarized the allegations of Alvarez and Nurnberg, and some of the oral and written witness statements. The report concluded:

> Based on the statements of both Mr. Numberg [sic], and Mrs. Alvarez, and taking into account the statements of other employees, it is credible; that both employees engaged in behavior and conduct that is strictly and specifically prohibited by DMB supply company policy. Specifically; "Verbal and physical conduct of a sexual nature[.]" Based on the statements of other employees as well as Mr. Numberg's [sic] own admission, it appears that this behavior was ongoing for some time. Company policy states that any violation will be dealt with by corrective action up to and including termination of employment.

Thompson forwarded his finished report to Gary Beane, the treasurer of DMB, and Wayne Simmer, DMB's president and one of its owners.

Thompson met with Simmer and Beane to discuss how DMB should respond to the report. Simmer suggested that both Alvarez and Nurnberg be terminated, but Thompson "didn't feel that a first-time violation where both people had been engaging in the practice deserved termination for either one of them." The company's final decision was to suspend both employees without pay for five days beginning on January 31, 2006. After the suspension, DMB transferred Nurnberg to another department, and he did not harass Alvarez again.

When Alvarez returned from her suspension, she experienced problems with other co-workers. One co-worker, Mike Sydnes, made numerous sexual

advances, commented on her breasts, and grabbed her arm. Alvarez did not report these incidents to any supervisor or management employee at DMB.

Alvarez continued to work at DMB until April 29, 2006. Alvarez was scheduled to work on May 1, 2006, but she called DMB and left a message saying that she had to stay with her daughter. In a letter dated May 2, Alvarez resigned from her position at DMB. She explained that she was resigning because of "continuous sexual harassment with co-workers and the lack of action taken by Supervisors, Managers, and the owner himself." She also attached a list of incidents that she encountered in her final weeks of employment.

Alvarez filed suit against DMB, alleging sex discrimination and retaliation, under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, 2000e-3, and the Iowa Civil Rights Act of 1965 ("ICRA"), Iowa Code §§ 216.6, 216.11. The district court granted summary judgment for DMB on both the state and federal claims. The court dismissed Alvarez's retaliation claims based on the suspension, because she could not show that DMB's reason for the suspension was pretext for unlawful discrimination. The court ruled that Alvarez could not prove constructive discharge because she did not notify DMB about the post-suspension harassment before she resigned. The court also granted DMB's motion for summary judgment on the discrimination claims, because DMB took prompt remedial action in response to the pre-suspension harassment that was

not welcomed, and because DMB did not have knowledge of the post-suspension harassment.

II.

We review the district court's grant of summary judgment *de novo*, viewing the evidence in the light most favorable to Alvarez, the non-moving party. *Semple v. Fed. Express Corp.*, 566 F.3d 788, 791 (8th Cir. 2009). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2).[2]

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[2] Consistent with our precedent, the district court concluded that the Iowa Civil Rights Act is interpreted in the same way as Title VII. *See Montgomery v. John Deere & Co.*, 169 F.3d 556, 558 n.3 (8th Cir. 1999); *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 616 (8th Cir. 1997). The Supreme Court of Iowa's recent decision in *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1 (Iowa 2009), concerning Iowa Code § 216.6 suggests that not all federal and Iowa discrimination claims should be analyzed the same. *See Newberry v. Burlington Basket Co.*, No. 09-3802, 622 F.3d 979, 2010 U.S. App. LEXIS 20009, 2010 WL 3746346, at *3 (8th Cir. Sept. 28, 2010). Alvarez does not argue, however, that the Iowa court has interpreted the retaliation provision of Iowa Code § 216.11 differently from the retaliation provision of Title VII, or that the Iowa court has formulated a different meaning of what constitutes a hostile work environment for purposes of a sex discrimination claim. We therefore analyze the federal and state claims together in this case.

A.

Alvarez first contends that she produced sufficient evidence to support a reasonable inference that she was suspended in retaliation for making a complaint of sexual harassment. Title VII makes it unlawful for an employer to discriminate against an employee because she has "opposed any practice made an unlawful employment practice," or has made a charge or participated in an investigation or proceeding under the statute. 42 U.S.C. § 2000e-3(a). A plaintiff must show that the protected conduct was a determinative factor in the employer's materially adverse employment action. *Van Horn v. Best Buy Stores*, 526 F.3d 1144, 1148 (8th Cir. 2008). Because the factual record was fully developed in connection with the motion for summary judgment, we address directly whether Alvarez has presented a genuine issue of material fact for trial on the ultimate question of discrimination *vel non*. *Riser v. Target Corp.*, 458 F.3d 817, 821 (8th Cir. 2006).

The key question here is whether Alvarez presented sufficient evidence to support a conclusion that DMB's proffered reason for suspending her was pretext for a retaliatory motive. *See Hunt v. Neb. Pub. Power Dist.*, 282 F.3d 1021, 1028 (8th Cir. 2002). DMB asserted that Alvarez was suspended because she violated DMB's sexual harassment policy by engaging in prohibited "[v]erbal and physical conduct of a sexual nature." Insofar as Alvarez argues there is a genuine issue of fact about whether she actually violated company policy and thus deserved to be

suspended, her argument is misdirected. As long as DMB honestly believed that Alvarez violated company policy, and acted on that basis, DMB is not liable for discrimination, even if a trier of fact would disagree with its finding. *See Richey v. City of Independence*, 540 F.3d 779, 784 (8th Cir. 2008). "If the employer takes an adverse action based on a good faith belief that an employee engaged in misconduct, then the employer has acted because of perceived misconduct, not because of protected status or activity." *Id.* We focus, therefore, on whether Alvarez can show that a genuine issue of material fact exists as to whether DMB suspended her because of her complaint about sexual harassment, rather than because DMB believed that she violated company policy. *See Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 637 (8th Cir. 2000).

Alvarez claims that her complaint of harassment was a determinative factor in her suspension, because but for her complaint, DMB would not have conducted the investigation that resulted in her suspension. Filing a harassment complaint, however, does not insulate an employee from the consequences of violating company policy. *See Richey*, 540 F.3d at 784. That Alvarez's complaint was the genesis of the investigation that led to her suspension does not, in and of itself, tend to show that she was a victim of unlawful retaliation.

Alvarez also argues that DMB did not act in good faith reliance on its internal investigation, because the company had reason to believe that reports of

Alvarez's misconduct were false. She highlights that Nurnberg's complaint against her arose in response to allegations filed against him, that Nurnberg changed his story about his own harassment, that she consistently denied participating in harassment, and that other co-workers did not witness Alvarez's alleged harassment. She also complains that Damon Robinson, one of the co-workers who claimed to have witnessed Alvarez's misconduct, was known to be a friend of Nurnberg, and that Thompson told Robinson that he was trying "to help the company, help [Nurnberg]." DMB responds that other witnesses supported a finding of misconduct by Alvarez, that Thompson learned that Robinson was also "tight" with Alvarez, and that Thompson and DMB ultimately disciplined Nurnberg rather than protect him.

In our view, the record does not support a reasonable inference that DMB acted with an intent to retaliate rather than based on a good faith judgment reached after its workplace inquiry. An internal investigation, like a judicial proceeding, often produces conflicting evidence and requires judgments about credibility and the weight to be given various pieces of information. That an employer must choose among competing inferences does not mean that there inevitably is a genuine issue of fact concerning the employer's good faith. Here, DMB decided to discipline both Nurnberg and Alvarez after investigating Alvarez's complaint of harassment; Alvarez alleges retaliation. If DMB had opted instead to discipline only Nurnberg despite reports that Alvarez

also engaged in misconduct, then Nurnberg might well have alleged disparate treatment based on sex. There may have been two reasonable responses for DMB under the circumstances, but an employer who investigates allegations of workplace misconduct is entitled to latitude in evaluating the information gathered, so long as the employer acts in good faith. *See EEOC v. Total Sys. Servs, Inc.*, 221 F.3d 1171, 1176-77 (11th Cir. 2000). The evidence here was not so lopsided as to support a reasonable conclusion that DMB was acting in bad faith when it determined that Alvarez committed misconduct.

Alvarez also complains that when Thompson summarized the written statements made by witnesses Kenny Sledge and Jamer Lickteig, he rephrased the statements to make them appear as if they accused Alvarez of harassment. This argument overstates the reasonable inferences that can be drawn from the record. Thompson's summary explains that some of the relevant information was obtained in a "verbal interview." That Thompson's summary includes information different from the statements written by the witnesses, therefore, does not demonstrate that the summary is misleading, because the summary never purported to limit its information to the written statements. Alvarez also objects that Thompson omitted all female input from his investigation report. But Thompson was not required to interview all possible witnesses, and no woman who was interviewed provided information about misconduct by Nurnberg and Alvarez.

Alvarez asserts the discriminatory attitude of one or more of the decisionmakers on her suspension supports a finding of discriminatory intent. She alleges that Wayne Simmer, the president and an owner of DMB, referred to women as "dumb skirts," commented on the appearance of a female job applicant, had sexual relationships with other employees, and demoted an employee who ended a sexual relationship with him. She also points to the fact that Thompson was later discharged from DMB, in part for viewing sexually inappropriate websites at work. We disagree that the distasteful behavior of Simmer and Thompson supports a reasonable inference of retaliatory motive. Thompson's preference in websites is not probative of whether he tolerated sexual harassment or discouraged complaints about it. Simmer's alleged conduct and statements are unsavory if true, but the fact remains that DMB developed through Thompson's investigation evidence that Nurnberg and Alvarez violated company policy against conduct of a sexual nature. Simmer's allegedly sexist attitudes, manifested with respect to different employees in unrelated contexts, are not sufficient to show that the finding of misconduct by Alvarez was really a pretext for a retaliatory motive.

Finally, relying on *Gilooly v. Missouri Department of Health & Senior Services*, 421 F.3d 734 (8th Cir. 2005), Alvarez contends that her retaliation claim must be submitted to a jury because DMB's conclusion that she violated company policy was based solely on statements of interested witnesses. The

narrow holding of *Gilooly*, however, was that a genuine issue of fact existed concerning the employer's motive when an employer's motive when an employer's discipline was based solely on its disbelief of an employee's harassment complaint, without any independent corroboration. *Id.* at 740-41; *see also Richey*, 540 F.3d at 784-85. Here, Alvarez was disciplined after DMB reasonably concluded that an investigation showed that she committed misconduct of a sexual nature. DMB's decision was not based on its belief that Alvarez filed a false complaint.

For these reasons, the district court did not err in granting summary judgment in favor of DMB on Alvarez's retaliation claim.

B.

Alvarez also asserted a retaliation claim based on a theory of constructive discharge. She argued that her resignation was prompted by sexual harassment that continued after her suspension. To prove a constructive discharge, an employee must show that the employer deliberately created intolerable working conditions with the intention of forcing her to quit. *Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241, 1247 (8th Cir. 1998). An employee is not constructively discharged, however, if she quits "without giving her employer a reasonable chance to work out a problem." *Id.* Alvarez contends that the harassment she experienced throughout her employment at DMB, and

DMB's failure to eradicate the harassment led to her being constructive discharge.

This claim fails, because Alvarez did not show that she notified DMB about the post-suspension misconduct and provided the company with an opportunity to remedy the problem before she resigned. Prior to Alvarez's suspension, she complained about Nurnberg's behavior. DMB investigated the complaints, suspended Nurnberg, and transferred him so he could no longer harass her. Alvarez did not make similar complaints about co-workers after she returned from her suspension. She admits that she never informed supervisors or management employees at DMB about any post-suspension harassment. Having given DMB no reasonable opportunity to remedy the problem, Alvarez cannot assert a successful constructive discharge claim. *See Coffman*, 141 F.3d at 1247.

Alvarez contends that she should be excused from the notice requirement, because she had no chance for fair treatment if she complained again about harassment. She concludes that DMB would not have treated her fairly, because the company initially ignored her complaints about Nurnberg, and then suspended her as a result of its later investigation into the complaints. "Part of an employee's obligation to be reasonable," however, "is an obligation not to assume the worst, and not to jump to conclusions too fast." *Smith v. Goodyear Tire & Rubber Co.*, 895 F.2d 467, 473 (8th Cir. 1990) (emphasis and internal quotation omitted). That DMB may not

have investigated Alvarez's initial complaints with lightning speed, or that Alvarez's complaints about Nurnberg led to the discovery of evidence that she herself violated company policy, did not excuse Alvarez from at least notifying DMB about the continued misconduct to see how the company would respond. The district court thus properly granted summary judgment in favor of DMB on Alvarez's constructive discharge claim.

III.

Alvarez next contends that the district court erred in granting summary judgment on her sexual harassment claims. Her claim is that sexual harassment by co-workers resulted in a hostile work environment that amounted to sex discrimination in violation of Title VII. *See Vajdl v. Mesabi Acad. of Kidspeace, Inc.*, 484 F.3d 546, 549 (8th Cir. 2007). To prove such a claim, Alvarez must establish that (1) she is a member of a protected group, (2) she was subjected to unwelcome sexual harassment, (3) the harassment was based on sex, and (4) the harassment affected a term, condition, or privilege of her employment. *LeGrand v. Area Res. for Cmty. & Human Servs.*, 394 F.3d 1098, 1101 (8th Cir. 2005). DMB cannot be vicariously liable for sexual harassment by non-supervisory co-workers. *See Engel v. Rapid City Sch. Dist.*, 506 F.3d 1118, 1123 (8th Cir. 2007). But DMB may be directly liable for its employees' actions that violate Title VII if the company "knows or should have known of the conduct, unless it can show that it

took immediate action and appropriate corrective action." *Id.* (internal quotation omitted). Where an employer takes "prompt remedial action that is reasonably calculated to stop the harassment," the employer is not liable under Title VII for the underlying sexual harassment. *Id.* When an employee complains about inappropriate conduct that does not rise to the level of a violation of law, however, there is no liability for a failure to respond. *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 521 (6th Cir. 2001) (Guy, J., opinion for the court on this point); *cf. Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 67 (1st Cir. 2002) ("In the absence of conduct creating a sex-based hostile educational environment, laxity on the part of school officials in investigating an incident is not actionable under Title IX.").

A.

Alvarez first argues the DMB should be liable for sexual harassment by Nurnberg and other co-workers that occurred before her January 10 complaint to Owens. She disputes the district court's conclusion that she welcomed the sexually-oriented comments, because she voluntarily participated in similar banter. Assuming for the sake of analysis that this dialogue was not welcomed, we conclude that summary judgment was nevertheless appropriate on other grounds.

For harassment to be actionable under Title VII, Alvarez must demonstrate that the harassment "was

sufficiently severe or pervasive as to affect a term, condition, or privilege of employment by creating an objectively hostile or abusive environment." *Meriwether v. Caraustar Packaging Co.*, 326 F.3d 990, 993 (8th Cir. 2003). The standards for a hostile environment are demanding, and "conduct must be extreme and not merely rude or unpleasant to affect the terms and conditions of employment." *Alagna v. Smithville R-II Sch. Dist.*, 324 F.3d 975, 980 (8th Cir. 2003). When evaluating a hostile environment, we look at the totality of the circumstances, "including the frequency and severity of the discriminatory conduct, whether such conduct was physically threatening or humiliating, as opposed to a mere offensive utterance, and whether the conduct unreasonably interfered with the employee's work performance." *Vajdl*, 484 F.3d at 551.

In light of our precedents defining the degree of severity that is required to demonstrate a hostile work environment, we conclude that the sexually-oriented remarks by Alvarez's co-workers of which DMB had notice before Alvarez's complaint on January 10 did not amount to actionable sexual harassment. DMB was on notice that Nurnberg and others made sexually inappropriate comments, including about Alvarez's breasts on several occasions, and that Nurnberg told Alvarez that he was fixing a table so she could "strip dance on it."

In *Vajdl*, however, this court held that more severe co-worker misconduct did not create a hostile environment. The employee in *Vajdl* alleged that over

the course of three months, one co-worker commented about her body frequently, touched the bangs of her hair, wiped water off her pant leg, repeatedly suggested she leave her boyfriend and go on dates with him, telephoned her at home, and offered to buy her a drink and give her a ride home. 484 F.3d at 551-52. A second co-worker repeatedly requested that the employee go on dates with him, and the third co-worker made inappropriate comments about her body over a two-week period. *See id.* at 551. Our court held that the employee could not "objectively support a claim of harassment so severe or pervasive as to alter a term, condition, or privilege of her employment." *Id.* at 552; *see also LeGrand v. Area Res. for Cmty. & Human Servs.*, 394 F.3d at 1102-03; *Duncan v. Gen. Motors Corp.*, 300 F.3d 928, 935 (8th Cir. 2002).

For better or worse, "Title VII does not authorize us to impose a 'general civility code.'" *Alagna*, 324 F.3d at 980 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998)). Because the episodes of misconduct of which DMB had notice prior to January 10 did not create a hostile environment, the company is not liable under Title VII regardless of whether DMB took prompt remedial action after Alvarez's initial complaints.

B.

DMB was later placed on notice that Alvarez was subject to physical touching and sexual comments by Nurnberg, and Alvarez contends that DMB should be

liable for this harassment. On January 10, 2006, Alvarez complained to Owens that Nurnberg had "slapped her on the butt." On January 20, 2006, Alvarez filed a written complaint with Clint Jubell, notifying DMB of many more incidents of physical touching and inappropriate comments.

"A hostile work environment is a cumulative phenomenon," and a series of individual episodes of inappropriate behavior eventually can amount to a hostile environment. *Engel*, 506 F.3d at 1124. We assume that after Alvarez's complaint of January 10 to Owens, DMB was on notice of harassment that arose to the level of a hostile environment. We therefore do not dispute the conclusion of the partial dissent, *post*, at 18-19, that the totality of Nurnberg's actions, verbal and physical, could amount to actionable harassment. But we conclude that DMB is not liable for co-worker harassment by Nurnberg, because DMB's response was sufficient to avoid liability. If an employer responds to harassment with prompt remedial action calculated to end it, then the employer is not liable for the harassment. *Id.* at 1123. "Factors in assessing the reasonableness of remedial measures may include the amount of time that elapsed between the notice and remedial action, the options available to the employer, . . . and whether or not the measures ended the harassment." *Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999) (citations omitted). Employees often must "tolerate some delay," however, so that an employer can "gauge the credibility of the complainant and the seriousness

of the situation." *Dhyne v. Meiners Thriftway, Inc.*, 184 F.3d 983, 988 (8th Cir. 1999)

When Alvarez complained to Owens on January 10 about physical harassment, Owens talked to Nurnberg about the complaint and Nurnberg denied it, and spoke with a co-worker, Brandin Bales, who had seen Nurnberg slap Alvarez. Owens reported this information to upper management. Ten days later, on January 20, 2006, Alvarez filed her written complaint with Jubell. Following this complaint, DMB launched an investigation that involved interviewing Alvarez's co-workers. Thompson prepared a report about the investigation and concluded that both Alvarez and Nurnberg had violated company policy. On January 31, DMB suspended Nurnberg without pay for five days, and after the suspension, transferred him to another department and he never harassed Alvarez again.

DMB's actions were "reasonably calculated to stop the harassment." *Carter*, 173 F.3d at 702. Although Alvarez was required to tolerate some delay while DMB investigated the complaint and formulated a remedy, DMB's response effectively ended the harassment within a reasonable time. Accordingly, the district court properly granted summary judgment in favor of DMB on Alvarez's discrimination claims based on pre-suspension sexual harassment.

C.

Alvarez next contends that the district court erred by holding that DMB was not liable for harassment that occurred after Alvarez's suspension. On this issue, the district court concluded that Alvarez failed to show that DMB knew or should have known of the post-suspension harassment and failed to take proper remedial action.

It is undisputed that Alvarez did not notify any supervisor or management employee at DMB about alleged harassment after her suspension. Alvarez asserts, however, that DMB's failure to respond to her initial complaints, and DMB's decision to suspend her after a complaint, create a jury question as to whether DMB is responsible for her failure to report post-suspension harassment.

Generally speaking, fear of retaliation is not a proper excuse for an employee's failure to report sexual harassment. *Adams v. O'Reilly Auto., Inc.*, 538 F.3d 926, 932-33 (8th Cir. 2008). "Normally bringing a retaliation claim, rather than failing to report sexual harassment, is the appropriate response to the possibility of retaliation." *Id.* at 933. In some cases, however, an employee may be excused for a delay in reporting harassment, if the employee can "demonstrate a truly credible threat of retaliation." *Weger v. City of Ladue*, 500 F.3d 710, 725 (8th Cir. 2007) (internal quotation omitted).

Alvarez has not presented sufficient evidence to support a finding of a truly credible threat of

retaliation that could excuse her failure to provide DMB notice of post-suspension harassment. DMB responded to her previous complaints about Nurnberg and disciplined him for misconduct. DMB's decision to suspend Alvarez was not based on her sexual harassment complaint, but on an investigation that revealed misconduct by Alvarez. Alvarez presents no evidence other than the prior discipline to show that DMB supervisors discouraged her from reporting harassment after her suspension. The record is thus insufficient to show that it was reasonable for Alvarez to conclude that another complaint would subject her to retaliation.

Alvarez also asserts that DMB should have been aware of the post-suspension harassment, because upper management at the company tolerated sexual misconduct and harassment at DMB was pervasive. When harassment of an employee is so severe and pervasive that an employer should know of it, the employer is charged with constructive knowledge of the harassment. *See Jenkins v. Winter*, 540 F.3d 742, 749 (8th Cir. 2008). Alvarez points to no evidence, however, that DMB was on notice of any harassment targeted at Alvarez after her suspension, and we are not persuaded that other unrelated misconduct at DMB notified the company of additional harassment aimed at Alvarez. The alleged conduct of Alvarez's co-workers was contemptible, but the evidence does not support a finding that DMB had constructive knowledge of post-suspension harassment of Alvarez,

and the company cannot be directly liable for any such harassment.

* * *

The judgment of the district court is affirmed.

CONCUR BY: BEAM

DISSENT BY: BEAM

DISSENT

BEAM, Circuit Judge, concurring and dissenting.

I concur in Parts I and II of the court's opinion. I disagree, however, with the court's conclusion that the record permits Ms. Alvarez's "hostile work environment" claim to be decided through summary judgment. "To overcome summary judgment on her hostile work environment claim [Alvarez] must present evidence from which a reasonable jury could find that [the] conduct towards her was more than merely offensive, immature or unprofessional. . . ." *Henthorn v. Capitol Commc'ns, Inc.* 359 F.3d 1021, 1027 (8th Cir. 2004). But, "[t]here is no bright line between sexual harassment and merely unpleasant conduct." *Id.* at 1026 (quotation omitted). Thus, we must look to the "totality of the circumstances" weighing "the frequency of the behavior, its severity, whether physical threats are involved, and whether the behavior interferes with plaintiff's performance

on the job." Id. The court concludes that the behavior here was not severe enough. I disagree that on the available record this can be decided by summary judgment.

Alvarez alleged (and established) that Nurnberg verbally and physically harassed her. Respecting the verbal harassment, the record shows that Alvarez was the target of sexually explicit jokes and language on several occasions including comments (1) eliciting her for sex; (2) about the size of her breasts; (3) harassing her for "touching" Nurnberg's genitals; (4) regarding a "joke flyer" which concerned Alvarez; and (5) about her inability to lift Nurnberg's male genitalia because of her weight restrictions. As concerns physical harassment, Nurnberg (1) smacked Alvarez's buttocks on several occasions; (2) stood close behind her so that her shoulder brushed his genitals; (3) pressed his genitals against her buttocks; (4) squeezed her neck; and (5) grabbed her hair. Additionally, other employees were alleged to have (1) smacked Alvarez on the buttocks; (2) pretended to smack her; and (3) grabbed her arm.

In reviewing the record, the district court seems only to have examined those actions of Nurnberg which Alvarez directly alleged in her written complaint to C. Jubell. But, as indicated, we must look to the "totality of the circumstances." *Id.*; *see also Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 355 (8th Cir. 1997) (noting that the evidence we examine must "not be compartmentalized, but must instead be based on the totality of circumstances of

the entire hostile work environment" (quotation omitted)); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 562 (6th Cir. 1999) (noting that the totality of circumstances test "includes all incidents of alleged harassment"). While Alvarez may not have specifically listed all of the alleged harassment in her written employment complaint, her pleadings set forth, and she has presented evidence supporting, a number of other actions. We should consider all of these actions.

As also earlier noted, "[a] work environment is shaped by the accumulation of abusive conduct, and the resulting harm cannot be measured by carving it into a series of discrete incidents." *Hathaway v. Runyon*, 132 F.3d 1214, 1222 (8th Cir. 1997) (internal quotation omitted). Accordingly, I believe Alvarez has established enough facts to survive summary judgment. That is because "[o]nce there is evidence of improper conduct and subjective offense, the determination of whether the conduct rose to the level of abuse is largely in the hands of the jury." *Howard v. Burns Bros., Inc.*, 149 F.3d 835, 840 (8th Cir. 1998).

I recognize that the hostile environment factor is difficult to analyze in light of our varying jurisprudence. Compare *Duncan v. Gen. Motors Corp.*, 300 F.3d 928 (8th Cir. 2002) (finding that a single request for a relationship, four or five isolated touching incidents, a request to draw a phallic symbol and teasing in the form of a gender-based poster were not severe enough to meet this element); with *Eich v. Bd. of Regents*, 350 F.3d 752 (8th Cir. 2003) (holding that

several touching incidents, standing behind the plaintiff simulating a sex act, and another incident of simulating a sex act were severe or pervasive enough to affect a term or condition of employment). However, "[e]ach case must stand on its own circumstances." *Eich*, 350 F.3d at 760. In light of the fact that we analyze the facts in each case independently, I believe that Alvarez has raised a genuine issue of fact for the jury to determine whether she was subjected to conduct which affected a term or condition of her employment. I would reverse and remand on this issue.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

VERONICA ALVAREZ,	*	
	*	
Plaintiff,	*	**No. 4:07-cv-00455-JEG**
v.	*	
	*	
DES MOINES BOLT SUPPLY, INC.	*	**ORDER**
	*	
Defendant.	*	

This matter comes before the Court on Defendant's Motion for Summary Judgment, which Plaintiff resists. The Court heard oral argument on the Motion on November 14, 2008; Mark Sherinian and Melissa Hasso represented Alvarez, and Thomas Werner represented DMB. The matter is fully submitted and ready for disposition.

I. BACKGROUND

For the purposes of a motion for summary judgment, the Court relies upon undisputed facts or views the evidence and draws all inferences in the light most favorable to the nonmoving party. *Weger v. City of Ladue*, 500 F.3d 710, 718 (8th Cir. 2007). Accordingly, this section lays out the facts in the light most favorable to Alvarez.

Defendant Des Moines Bolt Supply, Inc. (DMB), is a wholesale fastener distributor with its main plant

located in Des Moines, Iowa. Plaintiff Veronica Alvarez (Alvarez) worked in the kit department of DMB's Des Moines plant from February 19, 2001, until her resignation on May 2, 2006. Alvarez' job involved working at a table sorting various nuts and bolts.

DMB maintained a written policy prohibiting discrimination and sexual harassment in the workplace. This policy was published in DMB's Employee Guide and distributed to all DMB employees, including Alvarez. The written policy stated, in pertinent part, "If you feel you have been . . . harassed based on your sex . . . , you should report the incident to your supervisor, or another appropriate person. You may take this step without fear of retaliation. Your complaint will be . . . investigated promptly, thoroughly, and objectively." Def. App. 22. In addition to the Employee Guide, DMB distributed other memoranda and reminders of its policy. Alvarez was aware of DMB's policy and received the Employee Guide, employee handbook, and related materials describing DMB's sexual-harassment policy and procedures.

A. Alvarez' Sexual Harassment Complaints

Starting in March of 2004, Alvarez began to have trouble with DMB co-worker Brad Nurnberg (Nurnberg). Specifically, Nurnberg would make sexually explicit comments to Alvarez, such as, "Too bad you have a five-pound weight restriction because I need your help to hold my twelve-pound penis in

the bathroom," told her that he was building a table next to her so she could strip dance on it, and told her to "jump up and down" and shake her "baby girls," i.e. breasts. Pl. App. 33, 41-42, 204. Nurnberg told Alvarez that he wanted to get in her pants and asked her to flip her top up so he could see her "girls" (Def. App. 30), and would slap Alvarez on the buttocks while saying, "Good game" (Pl. App. 33, 120). Alvarez' co-worker, Khristine Jubell (Khristine),[1] saw Nurnberg pull Alvarez' hair once, and when Alvarez asked Nurnberg to stop, Nurnberg turned to Khristine and said, "She says 'stop,' but she doesn't mean it." Pl. App. 6, 89.

Other employees besides Nurnberg also made sexually explicit comments to Alvarez, stating that they wanted to use her breasts as cupcake holders. Alvarez also stated that another male employee slapped her on the buttocks, but Alvarez asked him to stop and he did. Sometime in 2003 before the problems with Nurnberg started, Alvarez' supervisor, Clint Jubell (Jubell), observed yet another male employee slap Alvarez on the buttocks three times. Jubell said Alvarez smiled and said, "Ouch, that's done." Pl. App. 71. Jubell stated he did not do anything because he figured Alvarez and the employee were dating.

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[1] Mrs. Jubell's first name is used for ease of reference because of the repeated references to Clint Jubell in this record.

Starting in the fall of 2005, Alvarez complained twice to her supervisor, Jay Owens (Owens), about Nurnberg's sexually explicit comments: once for the "twelve-pound penis" remark, and then once for the "baby girls" remark. Pl. App. 33. The complaints occurred several days apart, and Owens noted that when Alvarez made her complaints she was upset and in a bad mood. According to Alvarez, Owens was present when Nurnberg asked Alvarez to shake her "baby girls." When Alvarez complained to Owens, he said, "Huh-uh. Keep me out of this one." Pl. App. 33.

After Alvarez registered her complaints, Owens told Alvarez that he would speak with Nurnberg. Owens then warned Nurnberg not to say anything sexually inappropriate and believed that Nurnberg took him seriously. On one occasion, Nurnberg's response to Owens was that he and Alvarez were both just kidding and joking around. In addition to talking to Nurnberg, Owens told his manager, Dave Norem (Norem), about the incidents of verbal harassment. Norem also spoke with Nurnberg about at least one of the incidents.

Alvarez complained to Owens for the third time on January 10, 2006, after Nurnberg again slapped Alvarez' buttocks. In response, Owens asked Alvarez what she wanted him to do. Alvarez asked him to watch Nurnberg and, when Nurnberg slapped her on the buttocks again, to call him to the front office and confront him about it. No written report was made to document any of the three incidents reported to Owens. Alvarez, however, did not consider her

conversations with Owens to be formal complaints under DMB's sexual-harassment prevention policy.

On January 19, 2006, Alvarez got permission to take a longer lunch to deal with some family problems. When she returned from lunch, Nurnberg asked, "Did you just get back from lunch?" When she answered yes, Nurnberg said, "You dumb-ass." When Alvarez responded that she didn't like to be called a dumb-ass, Nurnberg responded, "Yeah, you're right, you're not a dumb-ass, your husband is." Alvarez then replied, "You know what? I'm just going to let her know everything you've said, everything you've [sic] did." Def. App. 85.

Alvarez was very upset but could not find her supervisor to complain that day. The following day, January 20, 2006, Alvarez filed what she considered to be a "formal" complaint with her new supervisor, Jubell, that indicated she felt Nurnberg was harassing her. Specifically, she claimed that Nurnberg slapped her on the buttocks, called her and her husband "dumbasses," stood close behind her while she was seated so when she turned around her shoulder brushed his genitals and then said, "Oh no, I'm going to tell you touched my balls," and made several sexually inappropriate remarks. Pl. App. 29-30. Jubell noted Alvarez was upset and told her to write down what had been happening to her.

Alvarez wrote out her complaint that same day and gave it to Jubell. In the statement, Alvarez wrote that Nurnberg had told her "To [sic] bad you have a

5 lb restriction cause [sic] I need your help to hold my 12 lb penis in the bathroom," that Nurnberg had told Alvarez how bad he wanted to "get in [her] pants," and that he had told her "to make [her] boobs move or flip [her] top up" so he could see her breasts. She detailed that Nurnberg would "stand over [her] and put his penis towards [her]" so that when she "would turn around it would cause [her] shoulder to rub against his penis." Alvarez wrote that Nurnberg "smacked [her] butt a lot [sic]" when nobody was looking, and that on January 19 (the day before) he had smacked her on her buttocks and told her that she and her husband were dumb-asses. Additionally, she made mention of a "joke flyer" that Nurnberg distributed throughout the plant on January 18 that contained obscenities.[2] Def. App. 29-31; *see also* Pl. App. 36. Alvarez alleges that she kept a detailed journal in which she recorded the date and particulars of many harassing incidents; however, Alvarez did not include them in her written complaint or tell anybody about them.

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[2] In her complaint, Alvarez claimed Nurnberg gave her one of the flyers; however, Alvarez admitted in her deposition that she had not seen any of the flyers. Alvarez said that a coworker told her that Nurnberg had gotten the flyers off the internet and that they contained obscene language.

B. DMB's Investigation and Response to Alvarez' Complaint

After receiving Alvarez' written complaint, Jubell notified Operations Manager Mike Thompson (Thompson) that Alvarez had filed a complaint. Thompson and Jubell then began an investigation into Alvarez' complaint. The investigation consisted of interviewing Nurnberg and other employees who had worked with or observed the interactions between Nurnberg and Alvarez. Jubell also had a follow-up conversation with Alvarez concerning her complaint. The investigation revealed the following information. Fellow kit department employee Brandon Bales said that he saw Nurnberg, while walking to his station, slap Alvarez on her buttocks "pretty hard." Kit department employee Jamer Licktag (Licktag) reported hearing Alvarez and Nurnberg make jokes that could be considered dirty, although Licktag personally did not feel the jokes were inappropriate. Licktag further noted that Alvarez and Nurnberg always seemed to be laughing.

Damon Robinson (Robinson), a plant worker who knew both Alvarez and Nurnberg, stated that in the past he had seen them act inappropriately toward each other.[3] Specifically, Robinson heard dirty jokes

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[3] Alvarez alleges that Robinson had no contact with her; specifically, Alvarez points to the fact that Robinson worked in a different factory during the time in question and that he never worked with her directly. Robinson had worked in the Des Moines plant for three years prior to the time in question,

(Continued on following page)

and saw Alvarez and Nurnberg engaging in horseplay and smacking buttocks. Plant employee Kenny Sledge, who had gone to lunch with Alvarez and Nurnberg on several occasions and was also Nurnberg's roommate, stated that he heard Alvarez and Nurnberg make off-color jokes to each other but had never noticed any discomfort between them.

When Jubell interviewed Nurnberg, Nurnberg initially denied slapping Alvarez on the buttocks, but he admitted to making off-colored jokes. Later, however, in his written response to Alvarez' complaint, Nurnberg admitted that he had slapped her, but only as part of a mutual, back-and-forth game. Nurnberg claimed that the game started between Alvarez and Robinson. However, while Nurnberg claimed Alvarez had introduced him to the game, it had tapered off, and he was the last one playing it. Nurnberg also claimed that he and Alvarez had exchanged random sexual comments and gestures. Furthermore, Nurnberg wrote that he thought he had a good relationship with Alvarez because she continued to ask to go to lunch with him but promised to nonetheless stop the behavior.

Jubell followed up with Alvarez on January 24, four days after the complaint. Jubell told Alvarez that he had seen her playing a buttocks-slapping game

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however, and while he did not work directly with Alvarez, he spoke with her and observed the relationship between Alvarez and Nurnberg on a daily basis from 2002 through October 2005.

with Jeremy Webb, a former employee, and said it sounded like the game was continuing between Nurnberg and Alvarez. Alvarez said it was not a game, and she did not want it to continue. Jubell told Alvarez that it would not happen anymore but said that stopping the behavior would be difficult if she was also playing the game or encouraging it. Jubell also told Alvarez that some people would be in trouble because of her complaint. When Alvarez expressed concern that she might be fired for filing her complaint, Jubell assured her that she would not. The conversation ended when Alvarez suddenly left, saying she needed to talk to her lawyer.

Thompson wrote up a report after he and Jubell had conducted their investigation. The report concluded that both Nurnberg and Alvarez engaged in behavior that violated DMB's sexual-harassment prevention policy. The report noted that DMB's policy stated that violations would be dealt with by corrective action up to and including termination, but the report included no recommendation as to what corrective action, if any, should be taken.

Thompson discussed the findings of his investigation with company president Wayne Simmer (Simmer) and company treasurer Gary Beane (Beane). Simmer's first reaction was to state that both Alvarez and Nurnberg should be fired since they also had the lowest performance ratings at the plant, but Beane objected and said they should consult with a lawyer before firing anybody.

Beane contacted attorney Deborah Tharnish (Tharnish) and had telephone conversations with her on January 26 and 27, the first time with Thompson and the second time with both Thompson and Simmer. They discussed what ramifications would result from dismissing or sanctioning Nurnberg and Alvarez, both because of the sexual harassment issues and also because of low productivity. They also discussed the fact that Alvarez had filed a workers' compensation complaint regarding a pinched nerve, and Beane informed Tharnish that the doctors believed Alvarez was lying about the injury. Tharnish advised them that because Alvarez had filed for workers' compensation, it created extra risks of a retaliation suit for DMB if it wanted to dismiss her, in addition to the risk from Alvarez having filed a sexual harassment complaint.

After talking with Tharnish, Simmer authorized Thompson and Beane to deal with the situation. Thompson conferred with Beane, and those two decided that a suspension was appropriate. Thompson also conferred with Jubell and went over all the results of the investigation. Thompson asked if Jubell thought that suspending both Nurnberg and Alvarez was fair, and Jubell said he thought suspending them both was an appropriate response since the investigation revealed that both Alvarez and Nurnberg engaged in sexual harassment.

The decision was made to suspend both Nurnberg and Alvarez without pay for five days and to move Nurnberg to a new job in a different department of

the plant where he would report to a different supervisor and have virtually no contact with Alvarez. They informed Nurnberg and Alvarez of their suspensions in early February 2006; the suspensions were served shortly thereafter.

C. Post-Complaint Harassment

Alvarez returned to her job in the kit department on February 8, 2006, and did not have any further problems with Nurnberg following their five-day suspensions. Alvarez made no further complaints to her supervisors about sexual harassment for the duration of her employment with DMB. However, Alvarez alleges the harassment did not stop. The day after Alvarez returned from her suspension, one of her co-workers asked Alvarez to show him her "cupcake holders." Pl. App. 24. The same co-worker also asked Alvarez if she would go to a hotel with him after work and on another occasion asked if Alvarez would meet him in the parking lot. A second coworker repeatedly exclaimed, "I could smack that ass," and once asked Alvarez, "[I]f [Nurnberg] got away with smacking [you] on the ass, does that mean anybody can do it?" Pl. App. 25.

Most of Alvarez' problems, however, were with a third co-worker named Mike Sydnes (Sydnes). On multiple occasions Sydnes asked Alvarez whether she "wanted to be with him," and also said he wanted her because of her breasts. Pl. App. 24-25. Sydnes also asked Alvarez if he could smack her buttocks since

Nurnberg had done so, and made a motion as if he were going to slap her buttocks but stopped before he did so. On one occasion when Alvarez was wearing latex gloves, Sydnes told her he was "ready." When Alvarez asked what he was ready for, he moved his hand over his head and stood with his hands and legs open, behavior that Alvarez interpreted as sexually suggestive.

During Alvarez' last week at work, on two occasions Sydnes grabbed Alvarez by the arm, which Alvarez interpreted as attempts to touch her breasts. Alvarez claims that other co-workers were present during this activity, but she believes that they all failed to observed the behavior. On the second occasion, Sydnes grabbed Alvarez' arm and asked her to shake "those babies" and asked whether it would hurt if she did. After this incident, Alvarez locked herself in the bathroom and cried. When Alvarez emerged, Owens asked her where she had been. Rather than respond, Alvarez changed the subject and did not report the harassment.

Three days before Alvarez quit, Sydnes told Alvarez, "We're alone. Nobody's around. Come on." Pl. App. 29. On April 28, 2006, Alvarez' last full day at DMB, Sydnes said that he wanted her to stay with him the whole weekend so he could see her wake up in his arms and feel her body. On that same day, another co-worker told Alvarez, "Too bad you got up. I was about to go in and smack that ass." Pl. App. 30.

D. Alvarez' Resignation

On March 31, 2006, Jubell came to Alvarez and told her that it was his last day at DMB because he had obtained another job. Alvarez says they had a thirty-minute conversation in which he told her "not to let the sexual harassment get away from [her] because Wayne Simmer played [her] dirty." Jubell said that Simmer had wanted to fire both Alvarez and Nurnberg and had discussed requiring Alvarez to lift heavy boxes so she would quit. However, Jubell said that the decision was made not to dismiss Alvarez after Beane suggested they talk with a lawyer, who said not to fire them. According to Alvarez, Jubell told her that Simmer stated, "Okay if I can't fire her then suspend both of them five days, no pay." Jubell then gave Alvarez his phone number and told her that he would help her testify against DMB. Pl. App. 27. Jubell, however, denies that he ever had such a conversation with Alvarez.

In late April 2006, Alvarez began mentioning to co-workers that she had plans to leave DMB in order to start a food-vending business. Alvarez had initially been in the practice of bringing tacos and burritos to DMB and selling them to people at lunchtime and later started selling them elsewhere on the weekends. Alvarez told several of her co-workers about how successful her business was and mentioned she had bought a food-vending trailer. Alvarez told co-worker Teresa Mongar (Mongar) and later admitted in her deposition that she had been thinking about quitting DMB because she had recently purchased a

food-vending trailer and would make more money if she sold tacos full-time. Alvarez also told Mongar that she would probably quit DMB when her daughter's baby was born.

April 28, 2006, was Alvarez' last full day at DMB. Alvarez told Khristine Jubell she was planning to quit because she was being sexually harassed. Khristine asked if she was being sexually abused, to which Alvarez responded, "No, verbally." Khristine asked who her abuser was, but Alvarez would not give a name. Following that conversation, Alvarez went to the supervisor's desk and made a long phone call. When she came back to Khristine's desk, Alvarez said she had been speaking with the civil rights commission, which said Alvarez would be eligible for unemployment benefits if she quit because of a hostile work environment. Def. App. 50.

Alvarez' last day at work was a four-hour Saturday shift on April 29, 2006. Alvarez was scheduled to work the following Monday, May 1, but instead of coming in to work, she left a message stating that her daughter was having pregnancy complications and that she needed to stay with her. On May 2, Alvarez wrote a letter resigning her job and sent it to DMB, who received it two days later on May 4. The letter claimed that DMB was a hostile environment, citing continual sexual harassment from co-workers and the lack of action taken by DMB management. Alvarez attached a list of some of the harassment she had received during her last weeks, stating that it had

caused her serious mental stress and made her unable to concentrate.

Alvarez' list detailed four events spanning April 18 through April 24, 2006, and described harassment she had received from someone she referred to as "Mike," which was later determined to refer to Sydnes. The first three entries alleged verbal sexual harassment, including Sydnes' comments about Alvarez' breasts and asking if he could smack Alvarez' buttocks since Nurnberg had done so. The last entry was dated Monday, April 24, 2006, five days before Alvarez' last day, and stated that Sydnes had tried to grab Alvarez' arm while verbally sexually harassing her. In her description of the event, Alvarez claimed she had tried to look for Owens, but he was on lunch break, and by the time Owens returned from break, the harassment had stopped.

Upon receiving Alvarez' letter of resignation, Thompson ordered an investigation into Alvarez' new allegations. Owens and Thompson subsequently conducted interviews with numerous plant employees about Alvarez' post-resignation allegations. Through their interviews, Owens and Thompson obtained the information detailed above regarding Alvarez' conversation with Khristine and Alvarez' plans to quit the company to help her pregnant daughter and to work full-time in her food-vending business. Consequently, Thompson reported that he was unable to corroborate any of Alvarez' claims of sexual harassment.

At a subsequent hearing, Alvarez testified that she decided to quit on Friday, April 28, the day she spoke with Khristine about her harassment. Alvarez testified that she did not inform her supervisor of the alleged harassment because she was afraid of being suspended, despite the fact that she had already decided to quit. According to Alvarez, the main reason for her resignation was not the sexual harassment she received from Sydnes but rather the sexual harassment she received three months earlier from Nurnberg, and Alvarez testified that she did not feel that DMB management attempted to make her work environment so miserable that she would have to quit.

II. DISCUSSION

Alvarez received right-to-sue letters and consequently filed this action, alleging co-worker sexual harassment and retaliation under both Title VII of the Civil Rights Act of 1964 and the Iowa Civil Rights Act (ICRA). DMB has moved for summary judgment, claiming that no genuine issue of material fact remains and therefore it is entitled to judgment as a matter of law on all counts.

A. Standard for Summary Judgment

Summary judgment must be granted if the record shows "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "In

considering a motion for summary judgment the court does not weigh the evidence, make credibility determinations, or attempt to discern the truth of any factual issue." *Thomas v. Corwin*, 483 F.3d 516, 526-27 (8th Cir. 2007). Rather, the Court focuses "on whether a genuine issue of material fact exists for trial – an issue of material fact is genuine if the evidence is sufficient to allow a reasonable jury verdict for the nonmoving party." *Morris v. City of Chillicothe*, 512 F.3d 1013, 1018 (8th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

While it is commonly recognized that "[s]ummary judgment should seldom be granted in discrimination cases," *Bassett v. City of Minneapolis*, 211 F.3d 1097, 1099 (8th Cir. 2000), the plaintiff is not entitled to survive summary judgment merely by establishing a prima facie case, Reich v. Hoy Shoe Co., Inc., 32 F.3d 361, 365 (8th Cir. 1994) (citing *Hebert v. Mohawk Rubber Co.*, 872 F.2d 1104, 1111 (1st Cir. 1989)). The "plaintiff's evidence must be sufficient to raise a genuine issue of material fact regarding [the] defendant's reason for the employment action taken." *Id.*; *see also Berg v. Norand Corp.*, 169 F.3d 1140, 1144 (8th Cir. 1999) ("There is no 'discrimination case exception' to the application of Fed. R. Civ. P. 56, and it remains a useful pretrial tool to determine whether or not any case, including one alleging discrimination, merits a trial.").

The party seeking summary judgment initially bears the burden of demonstrating the absence of any

genuine issue of material fact based on the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson*, 477 U.S. at 248. If the moving party satisfies its burden, the nonmoving party must go beyond the pleadings and, by affidavits or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is genuine issue for trial. Fed. R. Civ. P. 56(c), (e); *Celotex Corp.*, 477 U.S. at 322-23; *Anderson*, 477 U.S. at 257. "The mere existence of some alleged factual dispute between the parties will not defeat a motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson*, 477 U.S. at 247-48. An issue is "genuine" if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248. The substantive law determines what facts are material; "[f]actual disputes that are irrelevant or unnecessary will not be counted." *Id.*

B. Sexual Harassment

Title VII prohibits employers from discriminating against any individual based on sex with respect to their compensation, terms, conditions, or privileges of employment.[4] 42 U.S.C. § 2000e 2(a)(1).

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[4] The Iowa Civil Rights Act (ICRA), Iowa Code Chapter 216.6(1), has a similar provision that mirrors federal law and is interpreted in the same way as Title VII, so our discussion of Alvarez' Title VII claims applies equally to her claims under the

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"Discrimination based on sex that creates a hostile or abusive working environment violates Title VII." *Weger*, 500 F.3d at 718 (quoting *Nitsche v. CEO of Osage Valley Elec. Coop.*, 446 F.3d 841, 845 (8th Cir. 2006)).

A prima facie case of hostile-work-environment sexual harassment requires a showing that (1) the plaintiff belonged to a protected group, (2) the plaintiff was subjected to unwelcome sexual harassment, (3) the harassment was based on sex, (4) the harassment affected a term, condition, or privilege of employment, *Duncan v. Gen. Motors Corp.*, 300 F.3d 928, 933 (8th Cir. 2002), and, when the harasser is a coworker, and (5) that the employer knew or should have known of the harassment and did not take proper remedial action, *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004). The parties do not contest that Alvarez was a member of a protected group or that the alleged harassment was based on sex; therefore, the Court will examine only the three remaining elements.

1. Whether the alleged sexual harassment was unwelcome.

The second element queries whether the Plaintiff was subjected to unwelcome sexual harassment. In order for conduct to be unwelcome, the Plaintiff must

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ICRA. *Montgomery v. John Deere & Co.*, 169 F.3d 556, 558 n.3 (8th Cir. 1999).

have "neither solicited it nor invited it," and the Plaintiff must have regarded such conduct as "undesirable or offensive." *Scusa v. Nestle USA Co.*, 181 F.3d 958, 966 (8th Cir. 1999). DMB's investigation of Alvarez' complaint against Nurnberg produced evidence from three employees that Alvarez participated willingly in the exchange of sexually charged jokes and remarks. Alvarez now claims the conduct was unwelcome. A fact issue could arise on the grounds that a claimant may "go along to get along" and still sincerely find the conduct offensive. Yet, like behavior on the part of Alvarez in the nature of sexually charged jokes and remarks – in the absence of other evidence to the contrary – collides with the legal principle that Alvarez could not invite the behavior. A plaintiff's conduct must demonstrate the harassment was unwelcome. *See Hocevar v. Purdue Frederick Co.*, 223 F.3d 721, 736 (8th Cir. 2000). Alvarez' thus unsubstantiated allegations that this conduct was unwelcome appear insufficient in the summary judgment context. *See Pony Computer, Inc. v. Equus Computer Sys. of Missouri, Inc.*, 162 F.3d 991, 997 (8th Cir. 1998).[5]

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[5] The Court recognizes a distinction can be drawn between a plaintiff's statement of a conclusion as opposed to a statement of relevant facts that may lead to a conclusion. *See Kenney v. Swift Transp., Inc.*, 347 F.3d 1041, 1046 (8th Cir. 2003). The latter may generate an issue of material fact; the former may not.

The record is different with respect to the physical contact. Khristine Jubell saw Nurnberg pull Alvarez' hair and said Alvarez asked him to stop. While several employees reported seeing Alvarez and other employees playing what appeared to be a game of slapping buttocks, the reports either were ambiguous as to who was participating or else they portrayed Alvarez as the recipient of the slapping. No witness claims to have seen Alvarez slap anyone's buttocks. A genuine issue of material fact remains with respect to whether Alvarez solicited or invited the buttocks slapping, as opposed to merely tolerating it. Nurnberg testified that the "game" was tapering off, leaving him as the only one still playing. Bales testified that when he saw Nurnberg slap Alvarez on the buttocks, she did not laugh, seemed to be unhappy, and told Nurnberg she was upset. When a "game" involves a passive participant, as this one did, the lines between consent and tolerance can again become blurred. Furthermore, Alvarez alleges that she was so upset by Sydnes grabbing her arm that she cried in the bathroom. Consequently, Alvarez has raised a factual question as to whether she found the alleged nonverbal sexual harassment unwelcome.

2. Whether the alleged harassment created a hostile environment.

The fourth element asks whether the harassment affected a term, condition, or privilege of the Plaintiff's employment. Harassment affects a term, condition, or privilege of employment when it makes the

work environment objectively and subjectively hostile; that is, when a reasonable person would find the conduct hostile or abusive, and the plaintiff actually perceives it as such. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993). The Court determines whether the work environment was objectively hostile by looking at all the circumstances, including the frequency and severity of the discriminatory conduct; "whether [the conduct] is physically threatening or humiliating, or a mere offensive utterance; and whether [the conduct] unreasonably interferes with an employee's work performance." *Id.* at 22-23.

To overcome summary judgment, Alvarez "must present evidence from which a reasonable jury could find that [the] conduct towards her was more than merely offensive, immature or unprofessional." *Henthorn v. Capitol Commc'ns, Inc.*, 359 F.3d 1021, 1027 (8th Cir. 2004). This task is not insignificant as one examines how the Eighth Circuit has discussed what types of conduct rise to the level of a hostile work environment. *See Henthorn*, 359 F.3d at 1027-28 (finding that repeatedly requesting dates and calling the plaintiff at home did not constitute a hostile work environment in the absence of lewd or threatening comments, inappropriate touching, or sexual propositions); Duncan, 300 F.3d at 933-34 (finding that soliciting sexual favors, hand-touching, asking the plaintiff to sketch a phallic-themed planter, and displaying chauvinistic posters did not constitute a hostile work environment). *But see Eich v. Bd. of Regents for Cent. Mo. State Univ.*, 350 F.3d 752, 760

(8th Cir. 2003) (finding that a co-worker's repeated brushing himself against the plaintiff's breasts, running his fingers through her hair and up her spine, rubbing her shoulders, simulating sex acts in front of her, rubbing her leg, and pressing his genitals into her shoulder did constitute a hostile working environment).

The record before the Court shows that Alvarez was exposed to both verbal and physical harassment from many of her co-workers. As concerns verbal harassment, Alvarez was the target of sexually explicit language from Nurnberg, Sydnes, and other co-workers on several occasions, once while her supervisor, Owens, was present. Nurnberg also distributed an offensive "joke flyer" about Alvarez around the office, although Alvarez never saw the flyer herself. Instances of physical harassment include Nurnberg and other employees slapping Alvarez on the buttocks several times – some as part of a game, but some perhaps not. Nurnberg pulled Alvarez' hair and once stood closely behind her so that Alvarez' shoulder brushed Nurnberg's genitals as she turned around. Additionally, Sydnes twice tried to grab Alvarez' arm while soliciting sexual favors from Alvarez.

Alvarez participated in the exchange of sexually explicit remarks, a fact which the Court must consider in determining whether the work environment was hostile. *See Scusa*, 181 F.3d at 966 (concluding that the plaintiff failed to create a genuine issue of fact whether the behavior of co-workers was

unwelcome because the undisputed evidence demonstrated that the plaintiff engaged in similar behavior). *But see Bench v. Yellow Freight Sys.*, 312 F.3d 391, 396-97 (8th Cir. 2002) (concluding that (1) the plaintiff's repeated complaints to management regarding the offensive nature of graffiti aimed at the plaintiff, (2) evidence that the plaintiff requested that the conduct be stopped and attempted to erase the graffiti, and (3) the plaintiff's psychological problems as a result of the graffiti all combined to demonstrate that the conduct was unwelcome). There is no evidence of the content of the joke flyer – other than that one employee allegedly found it offensive – that would lead the Court to treat it as anything other than part of the sexually charged jokes and remarks, nor did Alvarez actually see it.

Nurnberg pulling Alvarez' hair falls into the category of merely offensive, immature, or unprofessional conduct; there is no evidence that it was of a sexual nature or that Alvarez perceived it as such. Though most of the buttocks-slapping went unobserved, and the majority of the slaps that Alvarez' coworkers did observe were described as either playful or part of a game, the fact remains that at least one slap – the one that Brandon Bales observed Nurnberg give – upset Alvarez and gave her visible pain. While conceivably humiliating, there is no evidence, however, that this disrupted Alvarez' work performance unreasonably or that it rose to the level of severe or pervasive conduct altering the conditions of Alvarez' employment. *See Meriwether v. Caraustar Packaging*

Co., 326 F.3d 990, 993 (8th Cir. 2003) (finding no hostile environment resulted from a single instance of a co-worker grabbing the plaintiff's buttock); *Alagna v. Smithville R-II Sch. Dist.*, 324 F.3d 975, 996-98 (8th Cir. 2003) (finding male teacher's inappropriate conduct toward female faculty member over two school years, such as touching her, commenting on her appearance, saying "I love you," exhibiting a demeanor of a sexual nature, calling her many times at home, and giving her two romance novels and another gift, was "not sufficiently severe or pervasive"); *c.f. Hawkins v. Holloway*, 316 F.3d 777, 782-83, 785-86 (8th Cir. 2003) (finding that a sheriff did not violate his employees' substantive due process rights when he repeatedly made sexually suggestive comments and grabbed, pinched, and poked their clothed buttocks on numerous occasions). The same is true about the incident when Nurnberg stood closely behind Alvarez to the point where when she turned around her shoulder brushed his genitals and then said, "Oh no, I'm going to tell you touched my balls." There is evidence, however, that Alvarez' work performance was affected when Sydnes twice grabbed or tried to grab Alvarez' arm and solicited sexual favors. After both incidents, Alvarez had to leave her workstation to end the harassment, she was crying, and she hid in the bathroom for an unspecified period of time. Alvarez' response to these incidents clearly affected her work performance, because it caused her to leave her workstation and resulted in her supervisor yelling at her for being absent. A reasonable jury could conclude that such conduct was adequately

intimidating and invasive that it rose to the level of creating a hostile work environment; therefore, Alvarez has produced sufficient evidence to satisfy the fourth element of her claim.

3. Whether DMB's response was proper.

The fifth element concerns whether the employer knew or should have known of the sexual harassment and did not take proper remedial action. "In determining whether the employer failed to take 'prompt and effective remedial action to end the harassment,' this court considers 'the amount of time between notice of the harassment and any remedial action, the options available to the employer such as employee training sessions and disciplinary action taken against the harassers, and whether or not the measures ended the harassment.'" *Jenkins v. Winter*, 540 F.3d 742, 749 (8th Cir. 2008) (quoting *Arraleh v. County of Ramsey*, 461 F.3d 967, 979 (8th Cir. 2006)).

"'Where an employer has a complaint procedure delineating the individuals to whom notice of harassment must be given,' actual notice is established when the employee notifies those individuals." *Id.* (citing *Weger*, 500 F.3d at 721). "Constructive notice, on the other hand, is established when the harassment was so severe and pervasive that management reasonably should have known of it." *Id.* (quotation marks and citation omitted).

Alvarez alleges that DMB was on notice of the sexual harassment because (1) Owens was present

when others made sexually explicit comments to her, (2) she complained to Owens twice about the verbal harassment and once about being smacked on the buttocks, and (3) she filed a formal complaint with Jubell.

Alvarez admits that the majority of the behavior prior to January 10, 2006, was not witnessed by anyone at DMB, and, as discussed earlier, the verbal harassment that took place in front of Owens about which Alvarez made complaints did not constitute sexual harassment because Alvarez was complicit in making the remarks and thus the remarks were not unwelcome. However, DMB was on notice of sexual harassment as of January 10, 2006, when Alvarez complained to Owens about Nurnberg slapping her buttocks, an incident also witnessed by Bales. On that day, Owens responded to Alvarez' complaint by asking Alvarez what she wanted him to do and following her instructions to watch Nurnberg to see if he slapped Alvarez' buttocks again. Alvarez made a second complaint about Nurnberg nine days later to Jubell, who took down Alvarez' side of the story and started an investigation that ultimately ended the harassment from Nurnberg.

The situation here is similar to that in *Brenneman v. Famous Dave's of America, Inc.* 410 F. Supp. 2d 828 (S.D. Iowa 2006). In *Brenneman*, as here, the employer had a sexual harassment prevention policy in place that gave specific information on how an employee could report a claim of sexual harassment. *See id.* at 842. Similarly, in both

cases the supervisor to whom the initial complaint was made largely ignored the complaint. *Id.* Although the initial responses were "less than ideal," the employers in both cases acted swiftly to deal with the problem when the employee complained again. *See id.* Ultimately, the court in *Brenneman* found that despite the delay, the employer's remedial actions were reasonable. *See id.*

Brenneman differs from this case in two ways. First, unlike in *Brenneman*, where the supervisor took no action whatsoever in response to the complaint, the record shows that Owens made a response and took some action, although both were less than satisfactory. The second difference is that here, instead of five days between the initial and the second complaint, nine days elapsed without a response from the employer. However, in light of the nature of the complaint – a slap on the buttocks instead of a more serious sexual assault – an increase in the delay from five to nine days has a negligible effect on whether DMB's action was reasonable. More important is the fact that DMB responded swiftly to correct the second complaint by setting in motion a full-scale investigation.

As part of the investigation, several of Alvarez' co-workers were interviewed, both male and female. The report compiling their statements indicated that both Nurnberg and Alvarez were involved in inappropriate behavior. Acting on the report, DMB suspended Nurnberg for five days and transferred him to a different department. As, if not more important,

however, is the fact that DMB's investigation and remedial action ultimately stopped the source of the complained harassment. Therefore, the Court finds that DMB's response to Alvarez' presuspension harassment was legally sufficient.

Regarding Alvarez' post-suspension harassment by Sydnes, DMB had no actual notice because she did not follow the harassment policy laid out in the Employee Guide and notify her supervisor of the harassment. Nor did DMB have constructive notice of the harassment. Alvarez herself stated that Sydnes' offensive conduct occurred when nobody was around or, when her co-workers were present, the harassment was never obvious enough to draw their attention. Alvarez claims that she had no responsibility to give DMB notice because she had been suspended the last time she filed a complaint. Alvarez argues that her suspension, combined with Jubell's report that Simmer initially wanted to fire her, "chilled" her, as it were, from filing a complaint.

It is unfortunate that, in the course of DMB's following its sexual-harassment policy, Alvarez may have become subjectively chilled from complaining about subsequent harassment. However, in the absence of an employer's misconduct, this Court is not in a position to account for the collateral damage that results from an employer's exercise of its business judgment. As this Court has said before, "It [is] not within the province of the Court to determine the wisdom of a company's decision as courts are not in the business of making personnel decisions and are

not equipped to act as human resource experts." *Wilson v. City of Des Moines*, 338 F. Supp. 2d 1008, 1027 (S.D. Iowa 2004).

DMB had no control over the private conversations its employees engaged in when they were not on the clock. Even assuming that Jubell, while walking out the door on his last day working for DMB, told Alvarez that Simmer had initially wanted to fire her, any chilling effect that resulted was unknown to DMB and therefore unintended. For its part, DMB dealt with the harassment by Nurnberg, effectively ending it by suspending Nurnberg and transferring him to a different department. DMB's investigation revealed that Alvarez had also engaged in behavior that violated DMB's sexual-harassment policy, and it made the decision to punish her as well, albeit less severely than Nurnberg. The province of the Court is to evaluate the legality, not the wisdom, of DMB's decision; consequently, the Court is unable to excuse Alvarez' failure to give notice of the post-suspension harassment.

Therefore, Alvarez has failed to make a prima facia case of sexual harassment because she is unable to satisfy the fifth element by showing that DMB knew or should have known of the harassment and yet failed to take proper remedial action.

C. Retaliation

Title VII prohibits an employer from discriminating or retaliating against an employee for engaging in

"protected activity," which is either opposing an act of discrimination prohibited by Title VII or participating in an investigation under Title VII. 42 U.S.C. § 2000e-3(a); *see also Hunt v. Neb. Pub. Power Dist.*, 282 F.3d 1021, 1028 (8th Cir. 2002). The ICRA contains similar protections.[6] *See* Iowa Code § 216.11(2).

To establish a prima facie case of retaliation, a plaintiff must prove the following elements: (1) she engaged in a protected activity such as filing a charge of harassment; (2) her employer subsequently took some sort of adverse employment action against her; and (3) the adverse employment action is causally linked to the protected activity. *Scusa*, 181 F.3d at 968; *see also EEOC v. Kohler Co.*, 335 F.3d 766, 772-73 (8th Cir. 2003); *Cross v. Cleaver*, 142 F.3d 1059, 1071 (8th Cir. 1998); *Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241, 1245 (8th Cir. 1998). To be viable, an "action claimed to be retaliatory must be sufficiently adverse to have created a material change in the employment, 'such as a change in salary, benefits, or responsibilities.'" *Henthorn*, 359 F.3d at 1021, 1028 (8th Cir. 2004) (quoting *LaCroix v. Sears, Roebuck, & Co.*, 240 F.3d 688, 691 (8th Cir. 2001)). In other words, "not everything that makes an employee unhappy constitutes an actionable adverse employment action." *Id.* For example, a negative employment review is only actionable if used to detrimentally

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[6] As mentioned above, the ICRA is interpreted in the same way as Title VII, so the two analyses are identical. *Montgomery*, 169 F.3d at 558 n.3.

alter the terms or conditions of employment, *id.* (citing *Spears v. Mo. Dep't of Corr. & Human Res.*, 210 F.3d 850, 854 (8th Cir. 2000)), and minor changes in responsibility or working conditions are not adverse employment actions if they do not result in a materially significant disadvantage to the employee, *id.* (citing *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1016-17 (8th Cir. 1999)).

The parties do not dispute that Alvarez satisfied the first element when she filed her sexual harassment complaint. Similarly, there is no dispute that Alvarez' suspension constitutes an adverse employment action.[7] Since the first two elements of a prima facie case of retaliation are present here, Alvarez must only make a prima facie showing on the third element – whether there was a causal connection between the protected activity and the adverse employment action. Since Alvarez has not produced any direct evidence of retaliation, she must make this showing by circumstantial evidence. *See Womack v. Munson*, 619 F.2d 1292, 1296 (8th Cir. 1980).

In the cases where the plaintiff offers circumstantial evidence of retaliation, courts apply the *McDonnell Douglas* burden-shifting analysis. *See id.* (applying the *McDonnell Douglas* burden-shifting

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[7] Alvarez has not properly plead a case of retaliation based on constructive discharge. In her complaint, she alleges she was forced to resign not because of any action by DMB but rather because of co-worker harassment, which, according to her admission, DMB was unaware of at the time it was occurring.

analysis to Title VII retaliation claims). Under this analysis, if the plaintiff establishes a prima facie case of retaliation, a presumption of unlawful discrimination exists. *Hunt*, 282 F.3d at 1028; *Stuart v. GMC*, 217 F.3d 621, 634 (8th Cir. 2000). The employer must then offer a legitimate and nondiscriminatory reason for the adverse employment action to overcome this legal presumption. *Hunt*, 282 F.3d at 1028; *Stuart*, 217 F.3d at 634. If the employer meets its burden, the presumption of retaliation disappears. *Cross*, 142 F.3d at 1071-72. The burden then shifts back to the employee to offer evidence either (1) that the proffered reason is pretextual, *Hunt*, 282 F.3d at 1028; *Stuart*, 217 F.3d at 634; *see also Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (finding "the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination"), or (2) that the proffered explanation is "unworthy of credence," *Weiland v. El Kram, Inc.*, 233 F. Supp. 2d 1142, 1151-52 (N.D. Iowa 2002). This test applies to both the Title VII and ICRA retaliation claims. *Vivian v. Madison*, 601 N.W.2d 872, 873 (Iowa 1999).

The anti-retaliation provisions of Title VII and the ICRA do not, however, insulate an employee from discipline for insubordination or ongoing violations of the employer's policies just because they occur after the plaintiff engages in protected activity. *Wilson*, 338 F. Supp. 2d at 1027 ("An employer is not prevented from enforcing its policies with an employee merely

because that employee has engaged in some protected activity."). However, "[a] pattern of reprimands for conduct that was not an issue before engaging in the protected activity is evidence that, when combined with the circumstances, including temporal, surrounding the discharge, could support an inference of retaliation." *Kirkland v. State Univ. of Iowa*, No. 3-99-cv-30105, 2001 U.S. Dist. LEXIS 25346, at *12 (S.D. Iowa May 1, 2001).

Alvarez points to the temporal proximity of her filing her sexual harassment claim and when she was suspended. "The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality . . . uniformly hold that the temporal proximity must be very close." *Smith v. Allen Health Syss., Inc.*, 302 F.3d 827, 833 (8th Cir. 2002). Alvarez made her complaint on January 19 and was suspended twelve days later on January 31. Here, twelve days is close enough proximity to satisfy Alvarez' initial burden and establishes a presumption of unlawful discrimination. The burden thus shifts to DMB to provide a legitimate and nondiscriminatory reason for the adverse employment action. *Richey v. City of Independence*, 540 F.3d 779, 784 (8th Cir. 2008).

DMB's sexual-harassment policy listed "derogatory jokes and comments" and "foul language" as unacceptable behavior. Def. App. 3. Three witnesses as well as Nurnberg stated that they had heard Alvarez swap off-color jokes with Nurnberg. Thompson's

report written contemporaneously with the incident pointed to Alvarez' participation in telling off-color jokes as the reason for her suspension. Accordingly, DMB has satisfied its burden of producing a legitimate and nondiscriminatory reason for the adverse employment action.

The burden then returns to Alvarez, who must prove by a preponderance of the evidence that DMB's reason was a pretext for illegal discrimination. *Richey*, 540 F.3d at 784. Alvarez merely reiterates the temporal proximity of her suspension. While "[a] pattern of reprimands for conduct that was not an issue before engaging in the protected activity" can support an inference of retaliation, *Kirkland*, 2001 U.S. Dist. LEXIS 25346, at *12, here we do not have a pattern of reprimands, but rather only a single event arising out of the employer's response to information obtained in an internal investigation that revealed violations of the policy by both employees.

Alvarez' argument that Simmer's initial comments that DMB should terminate both Nurnberg and Alvarez constitute evidence of pretext are similarly unhelpful for Alvarez. Rather than showing pretext, Simmer's comments show the opposite. Thompson's report showed that both Nurnberg and Alvarez had violated the company's policy on sexual harassment. Simmer wanted to terminate both Nurnberg and Alvarez, rather than making the statement about Alvarez alone or making her the sole recipient of discipline.

Alvarez points to the fact that regardless of the extent of her conduct, it was less than Nurnberg's, and therefore to punish Alvarez and Nurnberg with equal five-day suspensions was discriminatory and shows DMB's decision to be pretextual. Aside from Bales' statement that he observed Nurnberg slap Alvarez' buttocks, the reports from Alvarez' co-workers all spoke in terms of mutual activity and did not single Nurnberg out as being more aggressive or engaging more frequently in the behavior. Additionally, Alvarez did not make DMB aware of all the conduct that Nurnberg had engaged in. When asked to write down her complaint, she omitted such events as Nurnberg pulling her hair and failed to make a single mention of all the sexual comments from co-workers other than Nurnberg.

Nothing requires employers to dole out reprimands with exacting proportions. *King v. Hardesty*, 517 F.3d 1049, 1063 (8th Cir. 2008) ("[T]he employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination."). Furthermore, Nurnberg was in fact given more punishment than Alvarez. After the suspension, Alvarez was permitted to remain in her department and continue her job as usual, whereas Nurnberg was relocated to a different part of the plant and placed under a different supervisor. As mentioned above, it is to avoid petty squabbles about

the amount of punishment in cases like these that this Court has said, "It [is] not within the province of the Court to determine the wisdom of a company's decision as courts are not in the business of making personnel decisions and are not equipped to act as human resource experts." *Wilson*, 338 F. Supp. 2d at 1027.

Alvarez has failed to produce evidence sufficient to meet her burden of persuasion on the issue of pretext under the *McDonnell Douglas* balancing test and therefore is unable to generate a genuine issue of material fact on a causal connection between her suspension and her filing a sexual harassment complaint. Accordingly, the claim fails.

III. CONCLUSION

For the reasons stated above, Defendant's Motion for Summary Judgment (Clerk's No. 35) must be **granted**. The Clerk of Court is directed to enter judgment for Defendant and against Plaintiff.

IT IS SO ORDERED.

Dated this 23rd day of January, 2009.

/s/ James E. Gritzner
JAMES E. GRITZNER, JUDGE
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-1465

Veronica Alvarez

Appellant

v.

Des Moines Bolt Supply Inc.

Appellee

Appeal from U.S. District Court for the
Southern District of Iowa – Des Moines
(4:07-cv-00455-JEG)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 23, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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No. 10-1174

In The

Supreme Court of the United States

VERONICA ALVAREZ,

Petitioner,

v.

DES MOINES BOLT SUPPLY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

THOMAS M. WERNER
1441 – 29th Street, Suite 111
West Des Moines, Iowa 50266
Telephone: (515) 225-2888
Facsimile: (515) 224-6737
twerner777@yahoo.com

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether Petitioner has presented a compelling reason to grant the Petition where:

1. The Eighth Circuit's opinion affirming the District Court's rigorous analysis of Petitioner's evidence does not conflict with a decision of this Court or any Court of Appeals, and where Petitioner does not demonstrate that the Eighth Circuit's Ruling implicates an important federal question that has not been settled by this Court.

2. The Eighth Circuit's Ruling correctly held, both on the record before it and under the applicable prima facie elements for a hostile environment claim alleging sex discrimination, that Petitioner's two pre-2006 oral complaints of sexually oriented remarks by a co-worker did not amount to actionable sex harassment such as would require "prompt remedial action" by Respondent.

3. The Eighth Circuit correctly upheld the District Court's analysis of the record to the effect that, even if Petitioner's January 10, 2006, oral complaint when combined with her subsequent written complaint, are assumed to have implicated an actionable hostile environment claim, Respondent nevertheless took proper remedial action when it promptly investigated the complaints, issued discipline after the investigation, and subsequently transferred the alleged perpetrator so that he never harassed Petitioner again.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Des Moines Bolt Supply, Inc., does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

Petitioner has presented no "compelling reason" for her Petition for a Writ of Certiorari ("Petition") to be granted. See Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the Eighth Circuit's November 17, 2010, Opinion is in conflict with any decision of this Court or another Court of Appeals, or that the Eighth Circuit decided an important federal question that has not been settled by this Court. See Sup. Ct. R. 10(a-c). Therefore, the Petition should be denied.

At the outset, Petitioner contends that the Eighth Circuit's Opinion "diverted from the general agreement among the remaining Circuits regarding when and how an employer must investigate and respond to employee complaints of co-worker harassment in order to escape liability under Title VII". (Petition, p. 3). However, it bears emphasis that the decision appealed from recognized the unique factual setting of this case, and the narrowness of the issues to be decided. The Eighth Circuit simply held that, with regard to Petitioner's pre-January 2006 oral complaints of alleged harassment, she could not meet her prima facie burden of establishing an "actionable" violation of Title VII such that would require the employer's "prompt remedial action". That narrow ruling does not conflict with any decision of another Circuit Court addressing the "severity" and "pervasiveness" element of the prima facie burden.

With regard to Petitioner's argument that the decision below conflicts with other Circuit Court

decisions, Petitioner erroneously misconstrues the substance of the Eighth Circuit's decision. As seen above, the Court simply held that a reviewing court need not reach the "prompt remedial action" analysis if the plaintiff fails to establish that the conduct complained of rose to the level of an "actionable" Title VII violation. None of the Circuit Courts disagree with that analysis. And, the Eighth Circuit's interpretation of when the employer's duty to "investigate and remedy" begins is consistent with the law of all of the other Circuit Courts – that duty commences in situations where the complained of conduct is not trivial or minor, but rather involves "actionable" harassment violating Title VII. As such, the Eighth Circuit's decision on that issue creates no Circuit Court split.

Finally, Petitioner's argument that employers should have the duty to investigate even minor "non-actionable" complaints of harassment is misplaced, and ignores this Court's ruling in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998 (1998). Under Petitioner's view, this Court should require employers to "foresee" situations that might later escalate into actionable harassment, and also require them to prevent that "possibility" from occurring. In other words, under Petitioner's view it will be mandatory for employers to promptly investigate and, if necessary, remedy, every complaint of alleged harassment whether "actionable" or not. To date, no Circuit Court has ruled in the manner urged by Alvarez.

Simply put, Petitioner has failed completely to carry her burden of demonstrating that there are

compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

In an attempt to induce this Court's review, Petitioner has offered a highly glossed and sanitized version of the underlying facts. Yet, even if one were to accept her misguided contention that the decision below "contravenes the basic nature of the negligence standard articulated by this Court" and "stands in irreconcilable conflict" with decisions of the other Circuits, it is the unique and compelling facts of this case which make it a particularly unsuitable vehicle to review the issue raised. Thus, as Sup. Ct. R. 15.2 requires Respondent to point out to the Court any perceived misstatements of fact contained in the underlying Petition, Respondent will focus on the insufficiencies in that recitation, citing to the underlying opinions of the Eighth Circuit and the District Court.

Summary

Though Alvarez neglects to mention it in her Petition, her suit initially brought four separate and distinct claims under Title VII which she claims arose from her employment at Des Moines Bolt Supply, Inc., as follows:

1. That she was subjected to sex harassment by co-employee Brad Nurnberg.

2. That after complaining of sex harassment by Nurnberg, she was subjected to illegal retaliation, namely a five day work suspension.

3. That after serving her suspension she was subsequently subjected to sex harassment by other co-workers (not Nurnberg).

4. That as a result of the alleged sex harassment perpetrated upon her, she was subjected to a "constructive discharge" from her job.

Through her Petition Alvarez attempts to "resurrect" only her first claim alleging a sexually hostile environment involving co-worker Nurnberg, which she claims rose to the level of "actionable" harassment such as to require a "prompt remedy" by Respondent. As Alvarez notes, both the District Court and Eighth Circuit dismissed that claim as legally insufficient. What Alvarez fails to reveal in her Petition, and what she does not appeal from, are those Court's dismissal of her three other claims alleging retaliation, post-suspension sex harassment, and constructive discharge. Of course, the reason Alvarez makes no mention of those claims is because the record made clear that she could not establish the essential elements of any of those claims.

Factual Record

The record below showed that Alvarez was employed in the Kit Department of Des Moines Bolt Supply's Des Moines plant sorting nuts and bolts from February 19, 2001, until her resignation on May 2, 2006. On two occasions in the fall of 2005 she registered oral complaints with her supervisor, Jay Owens, that a co-worker named Brad Nurnberg had made sexual comments to her. Petitioner admits that "after Alvarez's first complaint about verbal conduct, Owens told Nurnberg to stop". (Petition, p. 5). She also admits that, after her second complaint to Owens about additional sexual remarks by Nurnberg, "Owens again told Nurnberg to stop". (Petition, p. 6). In addition to warning Nurnberg, Owens also told his manager, Dave Norem, about Nurnberg's remarks. Thereafter, Norem also spoke with Nurnberg about his conduct. (Petition, p. 31a).

In her District Court Petition, Alvarez claimed that beginning in September 2005 she kept a journal in which she recorded incidents of allegedly sexually offensive conduct by co-workers. And, while Alvarez makes a number of allegations about Nurnberg's conduct at pp. 4-5 of her Petition, she fails to mention one key fact: namely, that while she allegedly "documented" her allegations in her journal, she never provided Respondent's representatives with the journal so as to enable them to become aware of her complaints. Indeed, Alvarez never revealed her journal until after she filed suit against Respondent. As a result, whatever allegations Alvarez lists at pp.

4-5 of her Petition, the fact remains that she did not make Respondent aware of the majority of her complaints until after litigation began. Indeed, the District Court noted that while "Alvarez alleges that she kept a detailed journal in which she recorded the date and particulars of many harassing incidents", she "did not include them in her written complaint or tell anybody about them". (Petition, p. 33a).

As Alvarez admits, by the beginning of 2006 the most that can be said about her situation is that she had registered two separate oral complaints to her supervisor about sexual comments by Nurnberg, and on both occasions the supervisor (Owens) warned Nurnberg and told him to cease his comments. Hence, the record is clear that DMB did not "bury their heads in the sand" and ignore the situation, as Petitioner baldly states (Petition, p. 7); nor does the record show that DMB acted as if it were "free to do nothing with absolutely no risk if the conduct is technically not 'actionable'". (Petition, pp. 14-15). Most certainly, DMB did not condone "a one free bite rule", as Petitioner suggests. (Petition, p. 16). Indeed, for Petitioner to claim that the Eighth Circuit's Ruling ignored the "negligence standard articulated by this Court" (Petition, p. 16) contradicts what the record below truly shows; namely, that DMB (through Owens) acted promptly on Alvarez's initial complaints.

Alvarez also admits that she made no more complaints until January 10, 2006, when she "complained a third time to Owens". (Petition, p. 6).

During the intervening months, the record below showed that Alvarez regularly lunched with Nurnberg, her alleged tormentor. (Petition, p. 35a). On January 10, 2006, Alvarez orally complained to Owens that Nurnberg had slapped her buttocks. As noted by the District Court, in response Owens asked Alvarez what she wanted him to do. (Petition, p. 31a). Alvarez requested that Owens watch Nurnberg and, if the "slapping" occurred again, to confront him about it.

Apparently, no more "slapping" occurred thereafter. However, on January 19, 2006, Alvarez claims Nurnberg called her a "dumb-ass". (Petition, p. 32a). The next day, she complained to her new supervisor, Clint Jubell, about the comments and that she felt Nurnberg was harassing her. In response, Jubell requested that Alvarez put her complaint in writing. While Alvarez's Petition claims "Jubell asked Alvarez on the spur of the moment to draft a written complaint" describing her allegations (Petition, p. 6), the record shows that Alvarez was given sufficient time to draft her complaint; in fact, she was not given any timetable at all to submit it to Jubell.

Subsequently, Alvarez gave her written complaint to Jubell later that day. In it, she registered only the following complaints:

1. That Nurnberg had occasionally slapped her on the buttocks.

2. That Nurnberg had made sexual comments to her.

3. That Nurnberg had made 1-2 sexual advances to her.

4. That Nurnberg had handed out a "joke flyer".

After receiving the written complaint, DMB immediately began to investigate Alvarez's allegations. The company assigned both Jubell and Operations Manager Michael Thompson to conduct the investigation. Both Alvarez and Nurnberg were orally interviewed during the investigation. And, though Alvarez never mentions it in her Petition, Thompson and Jubell also interviewed numerous other employees who worked in the Kit Department with Alvarez and Nurnberg.

During the investigation, Nurnberg admitted making "off-colored jokes" but denied Alvarez's other complaints. He also described a mutual "butt slapping" game between himself and Alvarez, and also claimed that Alvarez had made sexual comments to him. Alvarez, on the other hand, repeated her complaints against Nurnberg and denied doing anything inappropriate.

As noted at the outset of this Brief, Alvarez's failure to adequately portray the record below, as well as her complicity in the very conduct she complained of, makes this case a particularly poor vehicle for the Court to decide the issue posed. Indeed, though Alvarez makes no mention of it, three separate witnesses stated that they had seen both Alvarez and Nurnberg engage in mutually inappropriate conduct;

specifically, that Alvarez had also engaged in dirty joke-telling, "smacking of buttocks", and off-colored comments. (Petition, pp. 5a, 34a-35a).

After the interviews were completed, Thompson prepared a written report of the investigation. That report concluded that "taking into account the statements of other employees" it appeared "both employees engaged in behavior and conduct that is strictly and specifically prohibited by DMB Supply company policy"; namely, "verbal and physical conduct of a sexual nature". (Petition, p. 6a). Though Alvarez's Petition asserts it was only Nurnberg who "claimed that Alvarez had engaged in a buttocks-slapping game with him" (Petition, p. 6), she again misrepresents the record: as noted by both the District Court and the Eighth Circuit, three separate witnesses aside from Nurnberg implicated Alvarez in the very type of activity she was complaining of. As stated above, those witnesses reported that Alvarez had made "dirty jokes", engaged in "smacking buttocks", and made "off-colored" comments.

After the investigation was complete, Thompson and Jubell discussed their findings with company President Wayne Simmer and Treasurer Gary Beane. While Alvarez baldly claims "that Wayne Simmer . . . made the decision to suspend Alvarez" (Petition, p. 7), she again misrepresents the record. As noted by the District Court, "Simmer authorized Thompson and Beane to deal with the situation", and "those two decided that a suspension was appropriate" for both Alvarez and Nurnberg. (Petition, p. 37a). As seen,

despite Alvarez's misrepresentations to the contrary, the record is clear that Thompson and Beane were responsible for making the decision to suspend Alvarez and Nurnberg.

Since both Alvarez and Nurnberg were implicated in the conduct complained of, each was suspended from work for five days. In addition, Nurnberg was transferred to a new job in a different department where he would have no contact with Alvarez. Though Alvarez neglects to mention it, it is undisputed that after his transfer Nurnberg had no further contact with her, and she admits he never harassed her again. (Petition, pp. 6a, 37a-38a). Therefore, it is undisputed that the formal investigation that Respondent undertook after receiving Alvarez's written complaint had the effect of ending the alleged harassment by Nurnberg. (Petition, pp. 55a-56a, with District Court noting that "DMB's investigation and remedial action ultimately stopped the source of the complained harassment").

So if one summarizes Alvarez's misrepresentations/less than candid portrayal of the record it reveals:

1. Despite Alvarez's claims otherwise, after her first two oral complaints about Nurnberg, Supervisor Owens did react quickly, confronted Nurnberg, and orally warned him about making further sexual remarks.

2. Alvarez neglects to mention that DMB's formal investigation into her written

complaint concluded, based upon the statements of three co-workers, that Alvarez was also guilty of the sexual conduct she complained of.

3. That, despite her representations to the contrary, it was not company President Wayne Simmer who decided to suspend her – as noted by both the District Court and the Eighth Circuit, that decision was made by Operations Manager Thompson and Supervisor Jubell.

4. Alvarez also neglects to mention that after Respondent conducted its investigation into her written complaint, the end result was that Nurnberg was disciplined, transferred, and never harassed her again.

After Alvarez's return from her five day suspension on February 8, 2006, she claims "other male co-workers began to sexually harass" her and "she resigned due to the continued harassment in May, 2006". (Petition, p. 6). What Alvarez neglects to mention, however, is that she never reported any of those alleged incidents to any supervisor or management representative of DMB. In fact, Alvarez admitted that, prior to the filing of her suit, Respondent was completely unaware of her post-suspension allegations since she did not follow the harassment policy in the company's Employee Handbook and notify her superiors of the alleged harassment. (Petition, pp. 22a, 38a, 56a).

Alvarez continued working at DMB until April 29, 2006. In late April 2006 she told certain co-workers that she was going to leave DMB to start a food-vending business. She told another employee she planned to quit her job when her daughter's baby was born. Alvarez was scheduled to work on May 1, 2006, but called DMB and left a message stating her daughter was having pregnancy complications and she needed to stay with her. She then failed to show for any of her shifts thereafter. Instead, on May 4, 2006, DMB received a resignation letter from Alvarez stating she was resigning due to alleged sexual harassment. With her letter, Alvarez attached a list referencing her allegations.

Even though Alvarez had already resigned her job, Operations Manager Thompson nevertheless conducted an investigation into her new allegations. In that investigation, however, no other employee corroborated Alvarez's claims; instead, certain employees told Thompson of Alvarez's statements that she was planning to quit DMB to either open a food-vending operation or help her pregnant daughter. With no supporting evidence, Thompson concluded that he could not corroborate any of Alvarez's harassment allegations.

As noted, Alvarez's Title VII suit raised her initial claim of sexual harassment involving Brad Nurnberg, as well as claims for retaliation, post-suspension sexual harassment, and constructive discharge. The District Court dismissed all four claims as legally insufficient, and the Eighth Circuit affirmed. In her Petition to

this Court, Alvarez seeks only to resurrect her initial sex harassment claim involving Nurnberg.

In a comprehensive and well-reasoned opinion, the Eighth Circuit held, with regard to the sex harassment claim involving Nurnberg, that Alvarez's pre-January 2006 oral complaints "did not amount to actionable sexual harassment" such as would require Respondent to take "prompt remedial action" to cure the situation. (Petition, pp. 18a-19a). And, with regard to Alvarez's oral complaint of January 10, 2006, and her subsequent written complaint nine days later, the Eighth Circuit held that even if those complaints involved "actionable harassment" Respondent's "response was sufficient to avoid liability". (Petition, p. 20a). For those reasons, the Court dismissed Alvarez's sex harassment claim involving Nurnberg.

In her Petition, Alvarez incorrectly states the Eighth Circuit decided "DMB was not liable for a failure to take prompt and remedial action in response to" her complaints involving Nurnberg because the alleged incidents before January 10, 2006, "did not create a hostile environment". (Petition, p. 7). Alvarez misstates what the Eighth Circuit actually held. The Court never held that the previous warnings issued to Nurnberg by Supervisor Owens constituted a "failure to take prompt and remedial action" after Alvarez's initial oral complaints. In fact, the Eighth Circuit never addressed that specific question. Rather, addressing only the narrow issue of Alvarez's burden to establish each of the elements of her prima

facie claim, what the Court did hold was that she could not establish a key element of her prima facie burden which precedes any analysis of the "proper remedial action" element; namely, she could not establish that the pre-January 10, 2006, conduct involved acts that rose to the level of "actionable harassment" violating Title VII. (Petition, pp. 18a-19a). As such, what the Eighth Circuit actually held was that "the company is not liable under Title VII *regardless* of whether DMB took prompt remedial action after Alvarez's initial complaints". (Petition, p. 19a) (emphasis added).

Clearly, the Eighth Circuit simply correctly held that an employer's duty to investigate and take proper remedial action is not triggered when the complaints involve alleged conduct that is not "actionable harassment" violating Title VII. That ruling is consistent with this Court's opinion in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998 (1998). And, with regard to Alvarez's January 10, 2006, complaint, and her ensuing written complaint, the Eighth Circuit correctly held that "DMB's response was sufficient to avoid liability". (Petition, p. 20a). As seen hereafter, the Eighth Circuit's careful resolution of those narrow issues implicates no circuit split and hardly "will further inhibit women from pursuing their right to a harassment-free work environment". (Petition, p. 15).

REASONS FOR DENYING PETITION

The case described in Alvarez's Petition bears little resemblance to the case actually litigated and decided by the Courts below. While the Petition describes a path-marking and conflict-creating decision of the Eighth Circuit, in reality that Court simply issued a well-reasoned affirmance of the District Court's Order using long-established "hostile environment" case law. Rather than wading into any circuit splits, the Eighth Circuit carefully decided very narrow issues which in no way implicate the problems suggested in Alvarez's Petition.

Indeed, the Eighth Circuit correctly focused first on the narrow question of whether Alvarez's pre-January 10, 2006, oral complaints involved conduct recognized as "actionable" sex harassment violating Title VII, noting that "prompt remedial action" by the employer was required only if the conduct complained of was "actionable". (Petition, p. 17a). After reviewing the facts, the Court correctly determined that, even in the light most favorable to Alvarez, the pre-January 10, 2006 conduct did not rise to the level of actionable sex harassment violating Title VII and, as such, Respondent was not liable "regardless of whether DMB took prompt remedial action after Alvarez's initial complaints". (Petition, p. 19a). With regard to the oral complaint of January 10, 2006, and the written complaint submitted by Alvarez nine days later, the Court held that, assuming such complaints rose to the level of an actionable hostile environment "DMB's response was sufficient to avoid liability". (Petition, p. 20a).

Despite Alvarez's suggestion, neither Ruling evidences a split with any *like* decision of any other Circuit Court.

As will be seen below, once it is clear that the Eighth Circuit addressed only narrow non-controversial issues the cases Petitioner cites easily distinguish themselves. Indeed, the decision below simply comports with long established case law recognizing that an employer's duty to take "prompt remedial action" is not implicated when the acts alleged do not involve an "actionable" hostile environment. Simply put, as all Circuit Courts hold, in the absence of conduct creating an actionable hostile environment claim, the "prompt remedial action" requirement imposed on employers is not implicated.

A. The District Court's decision, affirmed by the Eighth Circuit, correctly held that Alvarez's two pre-2006 oral complaints of sexually oriented remarks by a co-employee did not amount to "actionable" sex harassment such as would require "prompt remedial action" by Respondent and, as such, implicates no Circuit Court split.

In her Petition, Alvarez essentially seeks to rewrite long-established case law concerning a plaintiff's burden of establishing a prima facie case of a sexually hostile environment. It appears to be her goal to have this Court impose upon employers a duty to effectuate "prompt remedial action" even

where the conduct complained of does not amount to "actionable" harassment violating Title VII. According to her Petition, employers should have the "duty to prevent harassment from becoming a hostile work environment", (Petition, p. 13), even in situations where the conduct alleged is minor and does not rise to the level of "actionable" harassment. In doing so, Alvarez not only "puts the cart ahead of the horse"; she also ignores long-standing precedent of this Court concerning the importance of the term "sexual harassment".

Indeed, Alvarez attempts to lump all allegations of "harassment", however trivial or isolated, into the term "sexual harassment". However, in doing so she fails to recognize the importance of the term "actionable harassment" in the course of defining the employer's duty. Simply put, not every allegation of harassment will implicate a Title VII violation. Indeed, this Court in *Oncale*, 523 U.S. at 81, emphasized requirements "that prevents Title VII from expanding into a general civility code", stating that:

> " . . . The prohibition of harassment on the basis of sex . . . forbids only behavior so objectively offensive as to alter the conditions of the victim's employment. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment . . . is beyond Title VII's purview. We have always regarded that requirement as crucial . . . "

Clearly, only a few years ago this Court expressly recognized the distinction between complaints of

non-actionable harassment as opposed to those complaints that do involve harassing conduct sufficient to violate Title VII.

As noted previously, the Eighth Circuit simply held, in line with long-established case law, that with regard to Alvarez's pre-January 2006 oral complaints the "prompt remedial action" element of the prima facie case did not need to be analyzed since the conduct alleged did not rise to the level of "actionable" sex harassment. As noted by the District Court, the step-by-step prima facie requirements in a sexual harassment "hostile environment" claim requires a plaintiff to show, in order, that: (1) plaintiff belonged to a protected group; (2) plaintiff was subjected to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of that plaintiff's employment; and (5) when the harasser is a co-employee, that the employer knew or should have known of the harassment and did not take proper remedial action. (Petition, p. 46a).

In the ruling appealed from, the Eighth Circuit recognized that in a "hostile environment" claim the plaintiff's first burden is to establish that the alleged conduct involves "actionable" harassment, and that only when that burden is met do courts move on to address the additional element regarding the employer's duty to promptly investigate and take remedial action. In other words, the "investigative" and "remedial" analysis takes place only in situations where actionable harassment is involved.

Alvarez's argument would essentially have this Court ignore the methodology of proof stated above and require "proper remedial action" by employers regardless of whether the plaintiff satisfied elements (2), (3), and (4) of the prima facie case. In other words, her argument asks this Court to impose upon employers the duty to take "prompt remedial action" against alleged harassers even in situations where the conduct in question does not meet the definition of "harassment" enunciated in *Oncale* and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22, 114 S.Ct. 367, 370 (1993).

No Circuit Court requires employers to take "prompt remedial action" when the conduct alleged does not rise to the level of "harassment" recognized by this Court as an actionable Title VII violation. In fact, all of the Circuit Courts, including the decisions cited in Alvarez's Petition, only impose the "prompt remedial action" requirement upon employers for conduct that rises to the level of "actionable" harassment violating Title VII. No Circuit Court holds that employers must remedy minor complaints that do not constitute actionable harassment simply because there might be subsequent complaints involving acts that do rise to that "actionable" level. Certainly, no Circuit Court holds that employers have a duty to investigate and remedy minor acts of non-actionable harassment so as "to affirmatively prevent harassment from becoming an actionable hostile work environment", as Petitioner argues. (Petition, p. 16).

Here, both the District Court and Eighth Circuit held that, with regard to the pre-January 2006 oral complaints by Alvarez, there was nothing in the record to indicate the complained-of behavior of Nurnberg was so frequent or severe that a reasonable person in Alvarez's position would consider her work environment hostile or abusive. Similarly, the Courts held that the record demonstrated that Nurnberg's alleged behavior had no effect on Alvarez's ability to perform her job. Certainly, there was no showing that Nurnberg's comments rendered Alvarez unable to fulfill her job duties. As such, both Courts, with good reason, deemed the pre-January 2006 complaints to not involve conduct sufficient to create an "actionable" sexually hostile environment. In this regard, the decisions are entirely consistent with *Oncale*.

In the decision below, the Eighth Circuit noted the appropriateness of the analysis of the First Circuit in a similar "hostile environment" claim brought under Title IX. (Petition, p. 17a). That decision, *Frazier v. Fairhaven School Committee*, 276 F.3d 52, 67 (1st Cir. 2002), held: "In the absence of conduct creating a sex-based hostile educational environment, laxity on the part of school officials in investigating an incident is not actionable under Title IX". See also *Karibian v. Columbia University*, 930 F.Supp. 134, 147 (S.D.N.Y. 1996) ("If what occurs is an employer's failure to investigate and take remedial measures in response to a complaint of discrimination [based upon Title VII], and if it turns out that no actual discrimination has occurred, then there is nothing which

actually constitutes any conduct banned by the statute.").

Petitioner's argument, that employers should be forced to investigate and promptly "remedy" all allegations of sex harassment regardless of whether the conduct rises to the level of the type of harassment which violates Title VII, would have the effect of nullifying this Court's warning in *Oncale* and would require employers to enforce the "civility code" rejected in that decision. Try as she might, Petitioner cannot cite to a single Circuit Court ruling that stands in contrast to the Eighth Circuit's ruling here and holds that employers have a duty to take "prompt remedial action" even in situations where the conduct at issue is not "actionable". See *E.E.O.C. v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 505 (6th Cir. 2001) (holding that "a failure to remedy complaints of sexual harassment that doesn't rise to the level of gender discrimination is not actionable under Title VII").

Simply put, there is no conflict among the Circuit Courts on the specific issue addressed by the Eighth Circuit here; namely, that Alvarez's pre-January 2006 oral complaints did not involve conduct that rose to the level of "actionable" sex harassment violating Title VII such as to require Respondent to effectuate "prompt remedial action". That being the case, it is clear that Petitioner failed to establish a primary element of her prima facie case, and as such she has failed to show any compelling reason for this Court to review the decisions below.

B. The Eighth Circuit's decision does not create a Circuit Court split regarding the duty of employers in situations where the plaintiff's allegations do not involve actionable harassment violating Title VII.

With much hyperbole claiming the decisions appealed from permit "employers to effectively bury their heads in the sand about claims involving allegations of non-actionable sex harassment", Petitioner erroneously claims that the Eighth Circuit's decision "conflicts with the longstanding view of the negligence standard [imposed upon employers] used in other Circuits". (Petition, p. 9). That argument amounts to an exercise in semantics. As seen hereafter, what has actually occurred is that while the Circuit Courts impose the same essential requirements upon employers in situations where the conduct alleged involves "actionable" harassment, they have tended to describe those requirements in slightly different terms.

According to Alvarez, the Eighth Circuit's Ruling refuses to impose upon employers the duty to "make a reasonable inquiry into the details of the harassment and take measures to prevent it from worsening", and as such "conflicts with the longstanding view of the negligence standard used in other Circuits". (Petition, p. 9). Once again, she fails to note the importance this Court has placed upon the term "sexual harassment". Simply put, as seen in Division A above, when the acts in question do not rise to the level of "actionable

harassment" violating Title VII, then, despite Petitioner's claims to the contrary, employers have no duty to "make a reasonable inquiry into the details of the harassment and take measures to prevent it from worsening". (Petition, p. 9). No Circuit Court takes such a position.

Rather, what every Circuit Court that has decided the issue holds is that when a complaint involving *actionable* sex harassment by a co-employee is made, the standards are as follows: the employer first must be made aware of the conduct, and then must take prompt and appropriate steps to remedy the actionable harassment. For example:

a. As Alvarez states, the Eighth Circuit's standard is that once "the company knows or should have known of the conduct" it must "show that it took immediate action and appropriate corrective action". (Petition, p. 9). As stated in *Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999), a plaintiff must show the employer "knew or should have known about the harassment and failed to take prompt remedial action reasonably calculated to stop the harassment".

b. Phrasing the requirements slightly differently, the Seventh Circuit's standard requires employers "to take reasonable steps to both discover (become aware of) and rectify (take corrective action) acts of sexual harassment of its employees". (Petition, pp. 9-10).

c. The Ninth Circuit requires employers "to remedy or prevent a hostile or offensive work environment of which" the company knew; i.e., the company must first "know" of the conduct and must then "remedy" the situation. (Petition, p. 10). An "employer is liable for the hostile work environment created by a co-worker unless the employer takes adequate remedial measures in order to avoid liability". *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 875 (9th Cir. 2001).

d. The Tenth Circuit requires employers "to remedy or prevent a hostile or offensive work environment of which management-level employees knew". (Petition, p. 11). In other words, the company first has to "know" of the conduct, and must then take steps to remedy it (just as required by the Eighth Circuit). The analysis looks "first, into the employer's actual or constructive knowledge of harassment, and second, into the adequacy of the employer's remedial and preventive responses". *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1244 (10th Cir. 2001).

e. The Sixth Circuit requires employers "to take prompt and appropriate corrective action" for sexually harassing conduct that "it knew or should have known of". (Petition, p. 11). In other words, the standards are the same as those used in

the Eighth Circuit. The requirement is that "the employer both (1) knew or should have known of the harassment, and (2) failed to take prompt and appropriate corrective action". *McCombs v. Meijer, Inc.*, 395 F.3d 346, 353 (6th Cir. 2005).

f. In line with the Eighth Circuit, the First Circuit requires that employers "knew or should have known of the charged sexual harassment" and "failed to implement prompt and remedial action". (Petition, p. 12). To establish employer liability "a plaintiff must demonstrate that the employer knew or should have known of the charged sexual harassment and failed to implement prompt and corrective action". *Forrest v. Brinker Int'l. Payroll Co.*, 511 F.3d 225, 230 (1st Cir. 2007). In other words, the employer first has to "know" of the conduct, and then must take appropriate remedial action, just as in the Eighth Circuit.

Simply put, no conflict exists among the Circuit Courts which have decided the issue addressed by the Eighth Circuit here; namely, that the Court must first analyze whether a plaintiff has established the "actionable" harassment element, and only when that factor is established move on to an analysis of the "prompt remedial action" element. Indeed, the analysis of every Circuit Court is essentially the same: the Courts universally hold that in instances where employers become aware of conduct that constitutes

actionable sex harassment, they have a duty to remedy the situation. Try as she might, Alvarez is unable to support the picture she tries to paint: namely, that some Circuit Court requires employers to also promptly "remedy" minor non-actionable complaints of alleged harassment. Petitioner's far-fetched contention that the standards evidence a split among the Circuits is utterly without merit.

Further contradicting the alleged "split" among the Circuits is the fact that this Court previously noted the unanimity of views among the holdings of the Circuit Courts on the issue of judging employer liability for co-employee harassment claims. In *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 2289 (1998), this Court noted the "even broader unanimity of views" among the Circuit Courts in "uniformly judging employer liability for co-worker harassment under a negligence standard . . . " There, after citing to decisions of the Sixth, Eleventh, Second, Ninth, Eighth, Seventh, Fifth, Tenth, Third, and First Circuits, this Court specifically stated that the issue of judging an employer's liability for co-worker harassment "is not a controversial area". *Id.* As stated in *Faragher*, all of the Circuits essentially apply the rule adopted at 29 C.F.R. §1604.11(d) (1997), whereby the "employer is liable for co-worker harassment if it knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action". *Id.* As *Faragher* noted, the Eighth Circuit has clearly adopted that

standard as well. *Id.* (citing *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996)).

Petitioner's main complaint – i.e., that with regard to Alvarez's pre-January 2006 oral complaints of alleged harassment, the Eighth Circuit did not address the "prompt remedial action" element since it determined Alvarez could not establish the prior element that the conduct alleged involved "actionable" harassment – reveals her fundamental misunderstanding of how the Circuit Courts analyze the prima facie elements of a hostile environment claim, as well as her misunderstanding of *Oncale*. Simply put, no Circuit Court has ruled in the manner urged by Alvarez: namely, that even if an employee cannot establish the first element in the prima facie burden that he/she was subjected to actionable sex harassment, the employer still has a duty to effectuate prompt and appropriate remedial action so as to prevent the alleged conduct from later "becoming a hostile work environment" actionable under Title VII. (Petition, p. 13). Indeed, the "prompt remedial action" element is not even reached if "actionable" harassment is not present. There being no "split" among the Circuit Courts on the question of an employer's duty to promptly and appropriately remedy the situation when true actionable sex harassment is established, Petitioner has failed to show any compelling reason for this Court to review this issue.

C. The hypothetical situation urged by Alvarez does not justify this Court's review.

Alvarez essentially suggests that even in situations where the conduct complained of is minor and does not rise to the level of actionable harassment recognized by this Court's *Oncale* decision, employers should nevertheless have a duty to step in and take "prompt and appropriate remedial action" so that the conduct in question does not later rise to the level of actionable harassment. In other words, Alvarez would have this Court assign employers the responsibility to "foresee" a situation that might later escalate into actionable harassment, and attempt to prevent that possibility from occurring. As stated previously, no Circuit Court has ruled in the manner urged.

Of course, Alvarez cannot state with any specificity where the employer's "duty" should begin. For instance:

1. If a co-worker "winks" at another employee, should the employer be required to step in and investigate the situation and, if appropriate, take remedial action, just because the possibility exists that the relationship between the employees might later escalate into an "actionable" harassing environment?

2. If one employee "blows a kiss" at another, does Alvarez suggest that the employer must immediately step in and investigate, and if appropriate take

remedial action, all because the possibility exists that the situation between the two might later escalate into actionable sex harassment?

3. If a male employee makes a single comment about a female co-worker's figure, must the employer be required to immediately investigate the situation and, if appropriate, take remedial action, simply because there is the chance that, at some point in the future, the male employee's conduct might escalate into "actionable" sex harassment violating Title VII?

In the hypothetical situation urged by Alvarez, employers would be required to devote the resources to investigate even minor complaints of allegedly harassing conduct, and then take appropriate remedial action, even in situations where not a single actionable harassing incident occurred. Indeed, if Alvarez's version of Title VII's requirements comes to fruition, employers will be required to investigate and remedy even trivial non-actionable complaints of harassment just because the possibility exists, however remote, that the situation might later escalate into actionable harassment. Such logic stands *Oncale* on its head. The "general civility code" feared in *Oncale* will thus be the norm, and "conduct that is not severe or pervasive", *Oncale*, 118 S.Ct. at 1003, will be clothed with Title VII protection and it will be *mandatory* for employers to promptly investigate and, if appropriate, remedy, all complaints of harassment,

whether involving "actionable" harassment violating Title VII or not. Indeed, per Alvarez's suggestion, if employers do not promptly investigate and remedy even conduct that does not cross the threshold of being actionable harassment, they may be liable simply because subsequent conduct does cross that line. The potential time bomb for employers is thereby obvious.

Since every complaint of harassment does not necessarily ground an actionable Title VII claim, the employer's duty to "investigate and remedy" should not be implicated in every situation. "The error is in concluding that all harassment of a sexual nature amounts, *ipso facto*, to gender discrimination" violative of Title VII. See *E.E.O.C. v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 521 (6th Cir. 2001). At bottom, Alvarez is contending for a rule holding that any complaint of alleged harassment, whether the conduct involves actionable harassment or not, must be timely investigated and remedied by the employer. Such a rule, of course, would place upon employers the burden of investigating and remedying each and every minor "non-actionable" claim of alleged harassment simply because the situation might later evolve into one involving an actionable hostile environment.

Significantly, Alvarez never even argues that the Eighth Circuit's ruling that her pre-January 2006 oral complaints of alleged harassment did not amount to "actionable" conduct violating Title VII was somehow incorrect and inconsistent with *Oncale* and *Harris*. Indeed, she has made no effort to address

that concern, let alone demonstrate that the Eighth Circuit's ruling on that issue was somehow in error. Rather, Alvarez ignores her prima facie burden to first establish "actionable" harassment, and simply argues that employers should have the duty to investigate and remedy each and every complaint of alleged harassing conduct, whether the allegations involve an actionable Title VII violation or not.

According to Alvarez "the ruling below is inconsistent with the employer's duty articulated by this Court to affirmatively prevent harassment from becoming an actionable hostile work environment". (Petition, p. 16). Conveniently, Alvarez fails to cite any opinion of this Court in support of her proposition. Indeed, no opinion of this Court has ever held that employers have a duty to investigate and remedy claims of non-actionable harassment simply because there is the "possibility" the situation might later escalate into an actionable hostile environment which does violate Title VII.

Petitioner badly mischaracterizes the Eighth Circuit's opinion, as well as the record below, in order to float her campaign for the new "rule" described above. Her argument stands in stark contrast to what this Court recognized in *Oncale*; namely, that not all harassment claims involve conduct severe enough to implicate a violation of Title VII. However, as noted in *Oncale*, absent a Title VII violation there is no basis for implying any liability on the employer's part. This being the unambiguous law recognized by not only the Eighth Circuit, but also by the various

Circuit Courts, Alvarez has not carried her burden of demonstrating a "compelling reason" for her Petition to be granted.

CONCLUSION

The decisions below do not conflict with a decision of this Court or any Court of Appeals, nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not established her burden of demonstrating a "compelling reason" for the Petition to be granted.

Respectfully submitted,

THOMAS M. WERNER
1441 – 29th Street, Suite 111
West Des Moines, Iowa 50266
Telephone: (515) 225-2888
Facsimile: (515) 224-6737
twerner777@yahoo.com

Counsel for Respondent

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In The
Supreme Court of the United States

VERONICA ALVAREZ,

Petitioner,

v.

DES MOINES BOLT SUPPLY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF

MARK D. SHERINIAN
Counsel of Record
SHERINIAN, LEGRANT & HASSO LAW FIRM
3737 Woodland Avenue, Suite 630
West Des Moines, Iowa 50266
(515) 224-2079
sherinianlaw@msn.com

MICHAEL J. CARROLL
BABICH GOLDMAN
100 Court Avenue, Suite 403
Des Moines, Iowa 50309
(515) 244-4300

Counsel for Petitioner

May 16, 2011

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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RULES

Supreme Court Rule 14(g) 1

I. ALVAREZ SEEKS REVIEW OF THE EIGHTH CIRCUIT'S DECISION ONLY AS TO THE ISSUE STATED BECAUSE ALVAREZ' REMAINING CLAIMS WERE FACT-SPECIFIC AND DID NOT IMPLICATE A CIRCUIT CONFLICT.

In its opposition, Respondent Des Moines Bolt Supply, Inc. ("DMB") alleges Petitioner Veronica Alvarez ("Alvarez") misrepresented the record below and was "less than candid" in describing it. In accordance with Supreme Court Rule 14(g), Alvarez' Petition included a concise statement of the case setting out the facts material to the consideration of the question presented. Alvarez' brief factual summary was not intended to mislead the Court, but to comply with the Court's rules. Facts regarding those claims not presented for appeal are clearly set forth in the Eighth Circuit's opinion, which is included in Alvarez' Petition, pp. 1a-27a, and the District Court's opinion, found at pp. 28a-64a.

DMB also characterizes Alvarez' decision not to petition the Court for review of all of her claims against DMB as an admission as to the weakness of her position. Alvarez has not petitioned the Court for review of additional claims which the Eighth Circuit decided in DMB's favor because those claims were fact-based and did not implicate a circuit conflict. As such, they were inappropriate for review by this Court.

Finally, DMB's factual summary differs from that set forth in the Eighth Circuit's opinion, which was

charged with construing disputed facts in Alvarez' favor. For purposes of this appeal, Alvarez urges the Court to consider the Eighth Circuit's factual summary of the case as representative of the record, rather than the factual arguments submitted by DMB.[1]

II. REVIEW OF THE EIGHTH CIRCUIT'S DECISION IS NECESSARY TO RESOLVE A CONFLICT IN THE CIRCUITS AS TO AN EMPLOYER'S DUTY TO PREVENT AND CORRECT HARASSMENT IN THE WORKPLACE.

In her Petition for a Writ of Certiorari, Alvarez asked this Court to review the Eighth Circuit's decision that an employer has no duty to prevent coworker harassment from creating an unlawful hostile work environment. In requesting review, Alvarez argued that review is warranted because the Eighth Circuit decision conflicts with decisions in other circuits which impose a duty to discover, rectify and prevent a hostile work environment. This duty is consistent with the objective set forth in *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 106 S. Ct.

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[1] For example, DMB argues that Ms. Alvarez made only two complaints of harassment before the conduct became actionable. That interpretation ignores the complaint she made to Sharon Miller, the human resources representative, which Ms. Miller acknowledged. DMB also ignores the fact that even after the third complaint, DMB did nothing to effectively stop the harassment.

2399, 91 L. Ed. 2d 49 (1986) to eliminate all harassment in the workplace.

In essence, the conflict centers on whether an employer is liable only for failure to *remedy* co-worker sexual harassment that has already reached the actionable level – as the Eighth Circuit held – or whether an employer can also be liable for failing to take active steps to *discover* and *prevent* co-worker sexual harassment, as in the Seventh, Ninth, and Tenth Circuits. *See, e.g., Parkins v. Civil Constructors of Illinois, Inc.,* 163 F.3d 1027, 1035 (7th Cir. 1998); *E.E.O.C. v. Hacienda Hotel,* 881 F.2d 1504, 1515-16 (9th Cir. 1989); and *Adler v. Walmart Stores, Inc.,* 144 F.3d 664, 673 (10th Cir. 1998).

DMB ignores the essential differences among the circuits in evaluating the employer's duty. DMB first implies that this Court's decision in *Faragher v. Boca Raton,* 524 U.S. 775, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998) recognized a uniform circuit court standard for judging an employer's liability for co-worker harassment. While the *Faragher* decision noted that the circuit courts uniformly recognize a "negligence standard" for imposing employer liability for co-worker harassment, it did not describe any uniformity among the circuits regarding the employer's duty. Furthermore, as the *Faragher* decision only involved the employer's liability for a supervisor's conduct, it did not articulate the duty of an employer on the issue of co-worker liability. While the circuits each apply some sort of negligence standard regarding co-worker

harassment, they vary widely in the specific conduct (or lack thereof) that will result in employer liability.

DMB minimizes the circuit conflict as a mere "exercise in semantics." The Ninth Circuit responded to a similar complaint as follows:

> It might be answered that all legal disputation is, in the final analysis, "an exercise in semantics." Since man has not yet evolved into a telepathic being, he must resort to language in order to express his thoughts and desires . . . The law is shot through with semantic distinctions: Assault versus battery; flotsam versus jetsam; law versus equity; tort versus contract. . . .

Estate of Shedd v. Commissioner, 237 F.2d 345, 346 (9th Cir. 1956).

The differences in the employer liability standards among the circuits must be considered to have meaning with actual consequences. Consider the scenario at issue under the various circuit standards:

Alvarez complained to her human resources representative, "Brad made a comment about my breasts." The human resources representative did nothing. Alvarez then complained to her supervisor, "Brad is making sexually harassing comments to me." The supervisor responded, "I will tell him to stop." Weeks later, she complained again, "Brad is making sexual comments to me." Her supervisor again merely said, "I will tell him to stop." The harassment continued and worsened until it became legally "actionable"

over the course of several months.[2] DMB ultimately investigated and took remedial action upon Alvarez' fifth complaint when a new supervisor asked her to put her complaint in writing.

The Eighth Circuit imposes liability on employers only for failure to remedy conduct of which it "knows or should have known," not for failure to prevent. In *Alvarez,* the Eighth Circuit ruled that "because the episodes of misconduct *of which DMB had notice* [through her first three complaints] prior to January 10 did not create a hostile environment, the company is not liable under Title VII regardless of whether DMB took prompt remedial action after Alvarez' initial complaints." (See Opinion, Petition p. 19a) (emphasis added). In the Eighth Circuit, the employer is under *no duty to inquire further* into the nature of the comments made, whether the comments were accompanied by gestures, threats, or physical contact. In fact, there is an incentive not to inquire further. If the employer has no notice of the severity of the harassment, it cannot be liable for failing to remedy it.

To avoid liability in the Seventh Circuit, an employer must "*take reasonable steps to discover* and

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[2] The District Court held that "[a] reasonable jury could conclude that the harassment Alvarez suffered was adequately intimidating and invasive that it rose to the level of creating a hostile work environment." (District Court opinion, Petition pp. 52a-53a). As such, DMB's assertion that she did not establish that she suffered actionable harassment is wrong.

rectify" acts of harassment. *Cerros v. Steel Technologies, Inc.*, 398 F.3d 944, 952 (7th Cir. 2005) (emphasis added). This duty to "take reasonable steps to discover" is not present in the Eighth Circuit standard. This is not a matter of "semantics" alone; it is a substantial difference in the duties imposed on the employer. Employers with a duty to take active steps to discover the extent of harassment must ask the complainant for details about the harassment, and then take action to remedy it. They may not simply stand by passively and remain ignorant of the details, as in the Eighth Circuit.

DMB's argument that the circuits are in agreement in that an employer is not required to take any action to stop or prevent harassment until it passively is "made aware" of "actionable harassment" is misplaced. The Seventh Circuit's requirement that employers take on an *active* role "to take reasonable steps to discover" acts of sexual harassment (*Cerros*, 398 F.3d at 952) is not the same as the *passive* role ("become aware of") DMB suggests. It is not simply "phrased slightly differently"; it is the opposite.

DMB also ignores the fact that the Eighth Circuit does not impose a duty to "prevent" a hostile or offensive work environment, while the duty to "prevent" is explicit in the Ninth and Tenth Circuits. *See E.E.O.C. v. Hacienda Hotel*, 881 F.2d at 1515-16 and *Adler*, 144 F.3d at 673. The Ninth and Tenth Circuits' approach in requiring employers to prevent a hostile or offensive work environment from developing fulfills Title VII's "affirmative obligation to prevent"

sexual harassment in the workplace, as stated in *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 141 L. Ed. 2d 663, 118 S. Ct. 2257 (1998) and *Faragher,* 524 U.S. 775.

The "hypothetical situations" DMB presents in its opposition are easily remedied with the Seventh, Ninth and Tenth Circuits' uniform duty to discover and prevent actionable harassment. If a female employee complains to her supervisor that a male co-worker "winked" at her, blew her a kiss, or made a sexual comment to her, the proper response would be to inquire as to whether any additional harassing conduct was occurring. Perhaps the woman nervously mentioned the wink/blown kiss/comment first to open a dialogue with the supervisor. A properly trained supervisor in the Seventh, Ninth or Tenth Circuit would confidentially question her further: Has he touched you? What comments has he made to you? What were those comments? How frequently has he done this? What else, if anything, has he done that made you uncomfortable? The supervisor would thus be fulfilling his duty to *discover* harassment that may rise to the level where remedial action was required. The information gleaned from the interview may show that a serious problem was developing that should be addressed immediately. If the conduct in fact consisted of simply one wink, a brief reprimand to the offending winker would be appropriate. This duty to *discover* the extent of the harassment fulfills the purposes of Title VII in a way that the Eighth Circuit's "do nothing and remain ignorant" cannot.

It is the Eighth Circuit's standard that makes DMB's hypothetical situations more difficult. If an employer's duty to respond does not begin until the harassment becomes "actionable," how can the employer say with any certainty when the "actionable" point begins? Courts across the nation struggle with this very issue.

Additional differences are set forth in Alvarez' Petition and need not be repeated here. Had Alvarez been in the Seventh, Ninth or Tenth Circuit, DMB would have discovered the true frequency and severity of the sexual remarks, propositions, and physical contact she suffered with her *first* complaint, and the developing hostile work environment may have been prevented. The "potential time bomb for employers" DMB warns of is nothing more than the opportunity for millions of employees to work in a harassment-free environment. Such is the purpose of Title VII.

CONCLUSION

For the foregoing reasons and those stated in the Petition, Alvarez respectfully submits that her Petition for a Writ of Certiorari should be granted. Alvarez also submits that reversal of the Eighth Circuit's decision is appropriate in this case.

Respectfully submitted,

MARK D. SHERINIAN
Counsel of Record
SHERINIAN, LEGRANT &
HASSO LAW FIRM
3737 Woodland Avenue,
Suite 630
West Des Moines, Iowa 50266
(515) 224-2079
sherinianlaw@msn.com

MICHAEL J. CARROLL
BABICH GOLDMAN
100 Court Avenue,
Suite 403
Des Moines, Iowa 50309
(515) 244-4300

Counsel for Petitioner

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